

Sushil Arora vs.state

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Court : Delhi

Decided On : Dec-05-2017

Appellant : Sushil Arora

Respondent : State

Judgement :

§~ * IN THE HIGH COURT OF DELHI AT NEW DELHI Reserved on:

25. h July, 2017 Date of Decision:

5. h December, 2017 CRL.A. 1284/2015 % + SUSHIL ARORA STATE Appellant Through Mr. Vikas Arora & Ms. Radhika Arora, Advocates alongwith appellant in person. versus Respondent Through Ms. Aashaa Tiwari, APP alongwith SI Parveen Rathee, P.S. Chanakyapuri. CRL.A. 53/2016 RAJESH PANDEY Appellant Through Ms. Prachi Gupta, Advocate alongwith appellant in person. versus STATE (GOVT. OF NCT OF DELHI) Respondent Through Ms. Aashaa Tiwari, APP alongwith SI Parveen Rathee, P.S. Chanakyapuri. CRL.A. 190/2016 HEMANT GARG Appellant Through Mr. K. Singhal and Ms. Heena, Advocates. versus STATE NCT OF DELHI Respondent Through Ms. Aashaa Tiwari, APP alongwith SI Parveen Rathee, P.S. Chanakyapuri. CRL.A. 1248/2015 + connected matters Page 1 of 94 CRL.A. 1338/2015 VISHNU S/O PANCHU RAM Appellant Through Mr. M.N. Dudeja & Mr. Rajesh Kaushik, Advocates. versus STATE NCT OF DELHI Respondent Through Ms. Aashaa Tiwari, APP alongwith SI Parveen Rathee, P.S. Chanakyapuri. CRL.A. 283/2016

SONVEER @ PINKU Appellant Through Mr. Rajiv Mohan, Mr. Abhisheik Srivastava, Ms. Priyanka Singh & Mr. M.A. Karthik, Advocates. versus Respondent Through Ms. Aashaa Tiwari, APP alongwith SI Parveen Rathee, P.S. Chanakyapuri. STATE CORAM: HON'BLE MR. JUSTICE SANJIV KHANNA JUDGMENT Difference of opinion between the two Judges, primarily on the question of the eye witness identification of the perpetrators, and to some extent on other aspects, has led to this reference in the five appeals by Sushil Arora, Rajesh Pandey, Hemant Garg, Vishnu and Sonveer.

2. The aforesaid appellants challenge the judgment of the Addl. Sessions Judge dated 02.07.2015, holding them guilty of the murder of CRL.A. 1248/2015 + connected matters Page 2 of 94 Ankit Minocha (sometimes also referred to as Ankit) and for attempt to murder Surender/PW-8, under Section 302 and Section 307 read with Section 34 of the Indian Penal Code, 1860 (for short IPC) in Sessions Case No.7/2009 arising from FIR No.35/2009 registered at Police Station Chanakyapuri under Section 302/307/120B/34 of the IPC and Sections 25/27/

of the Arms Act, 1959.

3. The impugned judgment acquits Sonveer of the charge under the Arms Act, 1959 on the ground that no proof had been adduced with regard to the grant of sanction. No finding is recorded on the charge under the Arms Act against Vishnu. The State has accepted the said decision and the "victims" have not preferred any appeal.

4. By the order on sentence dated 26.08.2015, which is also under challenge, the appellants have been sentenced to imprisonment for life, for the offence under Section 302 read with Section 120B of the IPC with fine of Rs.15,000/- each in the case of Sushil Arora and Hemant Garg, fine of Rs.20,000/- in the case of Rajesh Pandey and fine of Rs.25,000/- each in the case of Vishnu and Sonveer. In default of payment of fine, Sushil Arora and Hemant Garg are to undergo simple imprisonment for six months, Rajesh Pandey is to undergo simple imprisonment for eight months and Vishnu and Sonveer are to undergo simple imprisonment for a period of one year. Benefit of Section 428 of the Code of Criminal Procedure,

1973 (Code, for short) has been granted.

5. The judgments of Gita Mittal and R.K. Gauba JJ.

correctly hold that the order on sentence is defective for the appellants were not CRL.A. 1248/2015 + connected matters Page 3 of 94 convicted under Section 120B as a substantive offence. Another defect noticed and apparent is that no punishment has been awarded separately for the offence under Section 307 IPC.

6. The two judgments, penned by Gita Mittal, J acquitting the appellants and R.K. Gauba, J affirming conviction of the appellants, are detailed and extensively refer to the ocular evidence of the purported injured eye witness Surender/PW-8, the complainant Sunil/PW-1, Paramjeet Singh/PW-5, and Varun/PW-6, who were statedly with the deceased in Santro Car No.DL2F-FK-0002 on 22.02.2009 at Ridge Road near Simon Bolivar T-Point at about 2:00 p.m. when occupants of an Indica car bearing No.DL3C-AX-2192 had fired on them, causing bullet injuries leading to the death of Ankit Minocha and injury on Surender/PW-8. The prosecution, in addition, relies upon testimony of Ranjeet Singh/PW-4 and Manveer Singh/PW- 2, especially the former, who, it is claimed, were passersby and public witnesses present at the place of occurrence. The prosecution also relies upon testimonies of Mahendra Singh/PW-9, Hemant/PW-10, and Gajender Singh/PW-11 to establish motive and the facts immediately prior and post the occurrence on 22.02.2009. Reliance is placed on the version given by Narender Singh/PW-12, who it is stated had taken the injured Ankit Minocha from the place of occurrence, i.e Simon Bolivar T-Point to the Trauma Centre at All India Institute of Medical Sciences(AIIMS, for short).

7. The primary issue and question of fact to be determined and decided in these appeals relates to the identity of the perpetrators, i.e., CRL.A. 1248/2015 + connected matters Page 4 of 94 occupants of the Indica Car, who had fired causing bullet injury and death of Ankit Minocha 8. Before I deal with the testimonies of the eye witnesses and the police witnesses and other circumstances on the question of identity of perpetrators, I would like to pen down facts which have been established and proven beyond doubt or even when there is some debate, no firm opinion is required. The said narration also refers to the

points in controversy which require detailed examination. The discussion would help me focus and adjudicate on the main controversy and issues. These are : (i) Mahendra Singh/PW-9 was known to and had business dealings with accused/appellant Sushil Arora because of which they were acquainted and if not friends. (ii) Mahendra Singh/PW-9 had extended loan of Rs.10 Lacs to Sushil Arora on interest on account of which differences had developed between the two. (iii) Mahendra Singh/PW-9 had visited Sushil Arora at his office at Chintu Car Point at 17, Pusa Road, Karol Bagh, Delhi on 22.02.2009 at about 1:00 p.m. for recovery of the aforesaid loan. (iv) Hemant/PW-10 and Gajender/PW-11 had accompanied Mahendra Singh/PW-9 and subsequently the deceased Ankit with Sunil/PW-1, Paramjeet Singh/PW-5, Varun/PW-6 and Surender/PW-8 had arrived at Chintu Car Point in Santro Car No.DL2F-FK-0002. For reasons CRL.A. 1248/2015 + connected matters Page 5 of 94 elucidated and stated below, this version of the prosecution has been accepted in view of overwhelming evidence of each of the said witnesses. (v) There is some dispute as to whether Hemant/PW-10, Gajender/PW-11, Varun/PW-6, Surender/PW-8 and Paramjeet/PW-5 had participated in the discussions at Chintu Car Point between Mahendra Singh/PW-9 and Sushil Arora on the question of return of loan. However, there is evidence to show that Sunil/PW-1 had entered the office when the discussions were on and was asked to wait outside. I would also accept presence of Hemant/PW-10 and Gajender/PW-11 in the discussion. (vi) Appellant/accused Rajesh Pandey has disputed his presence at Chintu Car Point or that he was involved in the discussion between Mahendra Singh/PW-9 and Sushil Arora. For the reasons set out and evidence adduced, I will uphold the prosecutions version that Rajesh Pandey was present during the discussion at Chintu Car Point on 22.02.2009. (vii) There is also credible and incriminating ocular and documentary evidence to show that there was a brawl or a fight outside Chintu Car Point in the parking area. Pushkar Raj, brother of Sushil Arora who had deposed as DW/6, had made a call from his mobile phone 9891255906 at police helpline number 100, which information was conveyed to Police Station Karol Bagh and recorded as DD CRL.A. 1248/2015 + connected matters Page 6 of 94 20A at 1:45p.m. by Head Constable Arvind Kumar/PW-27 and given exhibit mark Ex.PW-27/A. The said information was also conveyed to Police Station Rajender Nagar and recorded as

DD23A at 1:45 p.m. by Head Constable Mahadev Prasad/PW-28 vide exhibit mark Ex.PW-28/A. The brawl outside Chintu Car Point is deposed to by Sunil/PW-1, Paramjeet Singh/PW-5, Varun/PW-6, Surender/PW-8, Mahendra Singh/PW-9, Hemant/PW-10 and Gajender/PW-11. (viii) Thereafter, deceased Ankit, Sunil/PW-1, Paramjeet Singh/PW-5, Varun/PW-6 and Surender/PW-8 had left Chintu Car Point in the Santro Car bearing No.DL2F-FK- 0002 and had taken the Ridge Road towards Dhaula Kuan. Paramjeet Singh/PW-5, was driving the said car. They had stopped to purchase water and cold drink from a cart vendor, when occupants of an Indica car, driven at a very high speed, came there and had fired bullets at them. They started the car and had tried to escape but were compelled to stop the car at the traffic signal at T-Point on the Simon Bolivar Marg. The Indica car which had followed them also reached the spot. To save themselves, Sunil/PW-1, Paramjeet Singh/PW-5, Varun/PW-6 and Surender/PW-8 decamped by either opening the doors of the car or pulling themselves out of the window as the left side door on the rear side could not be opened. Ankit too came out of the car and was hit in the firing. Surender/PW-8 also got hit. CRL.A. 1248/2015 + connected matters Page 7 of 94 For the reasons stated below I would accept the said assertions. (ix) It is the case of the prosecution that the appellants Sonveer, Vishnu and even Hemant Garg were present at Chintu Car Point and were involved the brawl. They had come to Chintu Car Point at the instance of Rajesh Pandey on the request of Sushil Arora. Thereafter, Sonveer, Vishnu, Hemant Garg, Rajesh Pandey and Sushil Arora had followed deceased Ankit, Sunil/PW-1, Paramjeet Sunil/PW-1, Paramjeet Singh/PW-5, Varun/PW-6 and Surender/PW-8 in the Indica car and had fired upon and killed Ankit and injured Surender/PW-8. This factual dispute relates to the identity of the perpetrators and persons present in the Indica car. The said aspect is the core issue and question to be adjudicated, and has been examined and considered below. (x) There is ample evidence on the firing at the Santro Car at Ridge Road T-Point, Simon Bolivar Marg. Apart from testimonies of Sunil/PW-1, Paramjeet Singh/PW-5, Varun/PW-6, Surender/PW-8 and Manveer Singh/PW-2 and Narender Singh/PW-12, we have police witnesses and communication records. Constable Kalyan Shetty/PW-7, who was a part of the Mobile Crime Team and had taken 26 photographs at the spot marked Ex.PW-7/P1 to P26 and negatives Ex.PW-7/B1 to B26. He had reached the spot at about

3:15 p.m. and had taken instructions from Inspector CRL.A. 1248/2015 + connected matters Page 8 of 94 S.S. Rana/PW-26. Similar is the testimony of Constable Satpal Singh/PW-15 who has deposed having visited the crime spot with SHO Jagat Singh Bhati/PW-47. SI Harshwardhan/PW-42 was in-charge of the Mobile Crime Team who, after receiving information at about 2:30 p.m.-. 3:00 p.m., had reached the place of occurrence at 3:15 p.m. and had seen one black Santro car stationed on the road. Blood was also lying at the spot and he had taken the blood sample, earth sample and three empty cartridges. His report was marked as Ex.PW-42/A. ASI Nand Kishore/PW-24 was posted on 22.02.2009 on emergency duty at Police Station Chanakyapuri and DD15 was received by him. He along with Constable Pradeep had reached the place of occurrence where they had seen Santro car No.DL2F-FK-0002 parked on the side of the road. Blood was found lying on the ground on the back side of the car. The right side triangular window had a small hole with crack marks. Cold drink bottle and mobile phone were found lying in the car. Three fired cartridges and one live cartridge was found at the spot. These were lifted and seized. Testimony of Inspector S.S. Rana/PW- 26, the first investigating officer, and Inspector Jagat Singh/PW-47, SHO Police Station Chanakyapuri about the place of occurrence, i.e. T-Point Simon Bolivar Marg, presence of Santro car which had bullet hole and the presence of blood in the car and outside on the road, CRL.A. 1248/2015 + connected matters Page 9 of 94 recovery of three fired cartridges and one live bullet are credible and beyond question. Dr. Naresh Kumar/PW-16, Sr. Scientific Assistant, Forensic Science Laboratory, Rohini had examined the Santro car on 25th February, 2009 and had found blood, which was lifted from the place mentioned in his report Ex.PW-16/A. Dr. R.V. Anand/PW-19, Senior Scientific Officer, Ballistic Division, FSL, on 25th February, 2009 had conducted forensic examination on the Santro Car along with his team and had observed one entry hole caused by a projectile discharged from fire arm on the right side fixed quarter window of the car. There was also one dent present on the right hand side on the bonnet. His report was marked as Ex.PW-19/A. (xi) Mahendra Singh/PW-9, Hemant/PW-10 and Gajender/PW- 11 had left Chintu Car Point in a separate car and had reached Hotel Hyatt Regency when they came to know about the firing at T-Point of the Simon Bolivar Marg. Thereafter, the three had proceeded to the T-Point where they came to know that

the deceased had been shifted to the Trauma Centre at AIIMS. They accordingly proceeded to the Trauma Centre, AIIMS. For reasons set out below, I have accepted this enunciation of the aforesaid witnesses read with evidence of Sunil/PW-1 and Paramjeet Singh/PW-5. CRL.A. 1248/2015 + connected matters Page 10 of 94 (xii) Sunil/PW-1, Paramjeet Singh/PW-5, Varun/PW-6 and Surender/PW-8 ran away from the spot. Thereafter, Sunil/PW-1 proclaims having called and informed his uncle Mahendra Singh/PW-9 on telephone about the occurrence and had subsequently alongwith Paramjeet Singh/PW-6 reached Trauma Centre, AIIMS where Ankit was admitted. For good reasons stated below and in view of the ocular testimonies of the witnesses, I would accept this version of the prosecution. (xiii) There is sufficient material and evidence to establish that Ankit Minocha had suffered a homicidal death due to firearm injuries. The MLC of Ankit Minocha, Ex.PW- 50/A refers to history of gunshot wounds and that the patient was in a drowsy state with gasping breathing, and his abdomen was full of blood. His pupils were sluggish to reaction and there was an exit injury on the scalp from which blood was oozing. There were two other wounds including one on the right shoulder. Dr. Arvind Kumar/PW-18, who was then Senior Resident, Department of Forensic Medicine at AIIMS, had conducted postmortem examination of the dead body of Ankit Minocha. He has referred to abrasions, contused abrasion and a stitched wound on left parieto - occipital region of scalp. On dissection one bullet was recovered from left lateral side of the neck and small metallic fragment was recovered on left temporal region. There was another fire CRL.A. 1248/2015 + connected matters Page 11 of 94 arm entry wound on the right arm posterior, and the projectile had entered the chest cavity through lower lobe of the right lung, and was recovered from the right lobe of the liver. There was a stitched wound in the mid-axillary line of the right side chest. The two bullets and one metallic fragment were preserved and sealed and given to the investigating officer. PW-18 opined that the cause of death was due to the shock and haemorrhage as a result of antemortem fire arm injury, which was sufficient to cause death in the ordinary course of nature, individually and collectively. No burning, singeing, tattooing or blackening was seen. In cross-examination, PW-18 had affirmed that the fire arm injury was sufficient to cause immediate death. However, the witness expressed difficulty in precisely stating how long the victim

had survived or remained conscious.

9. Before I examine the testimony of the eye witnesses relating to the identification of those present in the Indica car at the time of firing, I would first examine the testimony of Manveer Singh/PW-2, Narender Singh/PW-12, and Ranjeet Singh/PW-4, stately passersby, who, as per the Appellants, are planted witnesses.

10. I am in agreement with the prosecution that Manveer Singh/PW-2 was present near the place of occurrence near Buddha Garden main road on 22.02.2009 at 2:00 p.m. He was on his motorcycle, which he had stopped on the left side of the road as there CRL.A. 1248/2015 + connected matters Page 12 of 94 was a person selling birds. He had then noticed one Indica car silver gray in colour which was being driven at a very high speed. When the Indica car had gone ahead 100 to 150 meters or a little more, he had heard a sound as if fire crackers had burst. He started his motorcycle and had followed the Indica car. He had then noticed that the Indica car was moving slowly and two or three persons were in the process of sitting inside the car. One person was possibly on the steering wheel as the Indica car was moving. He had followed the Indica car and had noticed its number as DL3E-AX-2192. Since he did not have much time and pen and paper was available with him, he stopped the motorcycle and had dialled 100 number from his mobile phone 9971054874. There was a black colour Santro car DL2F-FK-0002 stationed on the kaccha road. He had parked the motorcycle on the spot. At that time, he had seen three persons running towards Buddha Garden side, but he could not state whether the said persons had got down from the Santro car or not. He had seen a young boy wearing orange colour jersey and sky blue jeans with sports shoes of white colour lying close to the Santro car. The said person was bleeding profusely from his head and blood was coming out as if a water pipe with pressure was leaking. He immediately made a second call to the police from his mobile. In the meanwhile, one white colour Santro car arrived at the spot and two persons lifted the injured boy and had stated that they were taking him to hospital. Manveer Singh/PW-2, noticing them and their behaviour, had felt that they were known to the victim. The police came to the spot and had recorded his statement. He had seen what appeared to be bullet marks on the right CRL.A. 1248/2015 +

connected matters Page 13 of 94 side window glass of the Santro car. Police had taken photographs at the spot and he was visible in the photographs. Manveer Singh/PW-2 has accepted that he was not in a position to identify the perpetrators, as he had seen the occupants of the Indica car for a short duration. However, the occupants of the Indica were young persons. In his cross-examination, Manveer Singh/PW-2 affirmed having noted the Indica car number on a paper slip so as not to rely upon his memory. Though this paper slip was not produced before the Court, this, in my opinion, would not in any manner affect the credibility and truthfulness of the version given by Manveer Singh/PW-2. The aforesaid position is corroborated and affirmed in DD entries by the Delhi Police Control Room records marked Ex.PW-29/A and Ex.PW- 30/A. No doubt, as per the said form, the information from telephone No.9971054074 was conveyed by one Narender Singh but the same form also refers to the name of caller as Manveer Singh, son of Harnam, who was present at the spot. The information conveyed had given the number of the Indica car from which firing had taken place as 2192. The injured had been taken to Safdarjung Hospital in car No.DL4C-AG-7179. The form Ex.PW-30/A refers to the subsequent PCR recordings made at 2:05, 2:11 vide VTR69 2:05 and 2:58 vide TGR41 and vide VTR70 at 3:25 and 3:26 on 22.02.2009. The recordings mention that the number of Indica grey colour car was DL3S-2192 or DL3U-AX-2192 and that the person who was injured was sitting on the rear seat behind the driver, the injured had been taken to the Safdarjung Hospital and that the injured was admitted to the Safdarjung Trauma Centre and was on ventilator. The PCR CRL.A. 1248/2015 + connected matters Page 14 of 94 form Ex.PW-30/A, I must notice, incorrectly mentions that the victim was taken to Safdarjang Hospital, for it is a fact that Ankit was taken to Trauma Centre, AIIMS. However, this would not distract and negate the other contemporaneous recordings made in the PCR form. Perhaps information conveyed and recorded in the PCR form regarding Safdarjang Hospital was not made after verifying the place of admission but on the basis of perception and details given at the place of occurrence. Safdarjang Hospital and AIIMS are located on two sides of the same road. Pertinently, PCR form mentions name of injured as Surender/PW-8 and that he had gone to Chintu Car Point, Karol Bagh and that he was present in the Santro car when the occurrence had taken place. The aforesaid facts are corroborated

and proved by woman Constable Saubhagyawati/PW-29 and Head Constable Suresh Kumar/PW-30 who were posted in Police Control Room at telephone operator on 22.02.2009 and had recorded the said information transmitted by the PCR in the course of their official duties. Even if I ignore Ex.PW-29/A and Ex.PW-30/A in the absence of certificate under Section 65B of the Evidence Act, as was admitted by the two witnesses in their cross-examination, I find that the testimony of Manveer Singh/PW-2 is credible and believable. He has given truthful version of what he had seen and had occurred.

11. The testimony of Manveer Singh/PW-2 is important and relevant on several aspects, though he was not in a position to identify the perpetrators. Firing was a directed and deliberate attack. Inference being that there was a history and antecedent facts leading to the firing. The murderous assault was by the occupants of the Indica Car CRL.A. 1248/2015 + connected matters Page 15 of 94 bearing number 2192, who were at-least 3 or 4 in number. Lastly, there were some others who ran away from the spot.

12. Similarly, testimony of Narender Singh/PW-12 to the effect that he had picked up the deceased and taken him to the Trauma Centre, AIIMS in Car No.DL4C-AG-7179 is credible and merits acceptance. He has testified having not disclosed his name and identity at the hospital apprehending harassment. However, the police were able to track him the next day from his car number. The fact that the police had not seized his car and the car was not sent for forensic examination or he had washed his car or his friend Jagmohan was not examined are all inconsequential. These would not in any way affect the affirmative version given by him that he had taken deceased Ankit to the Trauma Centre at AIIMS. Manveer Singh/PW-2 corroborates the version by Narender Singh/PW-12, on the car number in which the deceased was taken to the AIIMS Trauma Centre immediately after the occurrence from the spot. Narender Singh/PW-12's testimony when read with testimony of other witnesses affirms that other occupants present with deceased Ankit in the Santro Car, who out of fear had fled from the spot, had not taken the deceased Ankit to the AIIMS Trauma Centre.

13. My attention was drawn to the MLC of Ankit, Ex.PW-50/A, which refers the name of the relative or friend as Satpal. Narender Singh/PW-12 had stated that he had not given his name to the hospital doctors/authorities. The MLC Ex.PW-50/A, records the patient's name as Ankit, son of unknown, resident of unknown. The time of CRL.A. 1248/2015 + connected matters Page 16 of 94 admission is 2:20 p.m. Testimony of Dr.Harsh Vardhan/PW-50 does not clarify on how and who had given the name Ankit, as the MLC was prepared by Dr.Mukesh Kumar whose handwriting and signatures were identified by PW-50. PW-50 himself had no personal knowledge. Thus, how the name Ankit got recorded in MLC Ex.PW- 50/A has not been explained. Narender Singh/PW-12, who is a resident of Mehrauli, possibly knew the deceased for he had stated that he had identified the Santro car standing at the spot as one belonging to Monu who was from Mehrauli and in transport business. Paramjeet Singh/PW-5 is also known as Monu. It is therefore probable that the version of Narender Singh/PW-12 that he had not given the name of Ankit is incorrect. However, this will not be a ground to disbelieve Narender Singh/PW-12 or the MLC Ex. PW-50/A or the time of admission of the deceased Ankit in the AIIMS Trauma Centre being 2:20 p.m. I do not think any benefit would accrue to the appellants or doubts arise on this account and reason. It is also possible that the name Ankit may have been ascertained from some documents available which the injured was carrying. It would be wrong to assume as suggested that personal details recorded on the MLC Ex.PW were given by deceased Ankit. Parentage and address of Ankit was not mentioned.

14. I would now examine the question whether Ranjeet Singh/PW-4 is a credible chance and public witness, a good samaritan who had seen the occurrence; or is a planted witness as asserted by the appellants. Ranjeet Singh/PW-4, I may point out, had identified the appellants as the five occupants of the Indica car. There are several CRL.A. 1248/2015 + connected matters Page 17 of 94 good reasons for me to doubt, if not disbelieve Ranjeet Singh/PW-4 coincidental presence at the place of occurrence and identification of the perpetrators. Ranjeet Singh/PW-4 has claimed that on 22.02.2009 he was going from his residence in Pahari Dhiraj to his sister's house in village Adhchini. At about 2:00 p.m., he was near Buddha Garden Gate where he had seen the Indica car being driven at a high speed and had overtaken the black Santro car when he heard a sound like a fire cracker. Two

persons who had taken out their heads up to the shoulder from the left side front and rear window of the Indica car were firing. The Indica car had stopped and all the five occupants came out. In the meanwhile, the Santro car, which was stalked by the Indica car, started moving and had proceeded towards Dhaula Kuan side. The five occupants of the Indica car immediately sat in the Indica car and followed and chased the Santro car. He had also followed them. The Santro car had stopped at the traffic red light and he had seen some boys come out of the Santro car from the front and the rear side. One boy in orange colour shirt who had come out from the rear seat of the Santro car was walking with difficulty. The Indica car which had followed the Santro car reached the spot and one boy got down from the Indica car and had fired at the boy with the orange colour shirt on his head. As noticed above, PW-4 had identified the five appellants as occupants of the Indica car, including Vishnu and Sonveer as the ones who were firing. He had also stated that the injured was taken to Safdarjung hospital in the Santro Car No.DL4C- AG-7179. CRL.A. 1248/2015 + connected matters Page 18 of 94 15. Ranjeet Singh/PW-4 claims to have proceeded to Safdarjung Hospital after informing his name and address to the PCR officer. After arriving at Safdarjung Hospital, PW-4 did not meet the family members of the deceased or any other person. After spending ten minutes at the hospital's Trauma Centre, he left the hospital and had proceeded to his sister's place which he had reached at about 3:00 p.m. He did not narrate the aforesaid incident to his sister and no discussion took place with her.

16. Ranjeet Singh/PW-4's presence at the place of occurrence is not corroborated and affirmed by Manveer Singh/PW-2, or Narender Singh/PW-12, or any of the police witnesses who had immediately visited the place of occurrence. He is not to be seen in any of the photographs. He has deposed having given his home address to the police officers of the PCR van, who had shortly reached the spot, an assertion certainly not accepted and stated by any of the PCR officers in their testimonies or in the communications to the control room. The call records and information conveyed by the PCR vide Ex. PW29/A and Ex. PW30A do not affirm and corroborate his chance presence at the scene of crime. There are also discrepancies in the version given by Ranjeet Singh /PW-4 viz. the version given by Manveer Singh /PW-2, Sunil /PW-1, Paramjeet Singh /PW-5, Varun /PW-6 and

Surender /PW-8. Ranjeet Singhs /PW-4 assertion was that the occupants of Indica Car five in number had got down when the firing had taken place near the Cold Drink Venders Cart. This assertion is not deposed to and affirmed by the other witnesses. CRL.A. 1248/2015 + connected matters Page 19 of 94 17. Cross-examination of Ranjeet Singh /PW-4 and police witnesses reveals another aspect. PW-4 initially denied knowing the deceased or his father but he subsequently accepted that he had met father of the deceased at Police Station Sadar Bazar regarding some other incident in October/November, 2010. This visit to Police Station Sadar Bazar was made pursuant to a call to him by father of the deceased regarding a road accident.

18. The visits to police station stand affirmed and established from the photograph shown to Rajiv Kumar Minocha/PW-32 in his cross-examination conducted on 24th November, 2011. PW-23 had accepted that on one or two occasions, when he happened to visit the police station, Ranjeet Singh/PW-4 had accompanied him in the same car. He identified himself in the photograph with the said witness, his brother Vijay and Inspector Arun Kumar/PW-48A. Inspector Arun Kumar/PW-48A had similarly identified himself in the said photograph being present with Ranjeet Singh/PW-4 and Rajiv Minocha/PW-32. Question therefore arises whether Ranjeet Singh/PW-4 had known the family of the deceased before or prior to the occurrence. He certainly knew the family of the deceased post the occurrence. The statement of Ranjeet Singh/PW-4 and the cross-examination would indicate and reflects that possibly this witness knew the family of the deceased from before. Ranjeet Singh/PW-4 was residing in the vicinity and within the same area where the deceased used to live i.e. Pahari Dhiraj. This area no doubt is thickly populated, albeit Ranjeet Singh/PW-4 has accepted that he and his brother were well known residents of the said area. CRL.A. 1248/2015 + connected matters Page 20 of 94 19. Ranjeet Singh/PW-4 has accepted in his cross-examination that he was carrying on business in Sadar Bazar, Delhi in partnership and was an owner/landlord of ancestral properties in Old Delhi, with several tenants. His wife is teaching as a lecturer in Delhi University, his two daughters were staying in Australia and his son had a foreign degree. Yet, PW-4 professed that he did not have any mobile phone and that there was no landline phone also in his office premises. It is rather difficult to accept and believe that Ranjeet Singh /PW-4 given

his background and economic and social status, did not have a mobile phone and hence the contention of the appellants that the mobile number details were deliberately withheld and concealed, as these would have helped ascertain and verify whether the said witness was or was not present at the place of occurrence. Call records would have also indicated and revealed whether Ranjeet Singh/PW-4 had known the family of the deceased from before. On the said contention, I would only observe that it is somewhat difficult to accept that Ranjeet Singh /PW-4 did not have a mobile phone.

20. Ankit was not taken and admitted in the Safdarjung hospital, as deposed by Ranjeet Singh/PW-4. I have referred to the PCR form Ex.PW-30/A, which mentions that Ankit was taken to Safdarjang Hospital and observed that the said recording is factually incorrect but inconsequential for the said information was recorded on the basis of the details collected at the place of occurrence and not after verification. However, Ranjeet Singh/PW-4 had stated that he had proceeded and seen the victim in the hospital, namely, Safdarjang Hospital and not at the AIIMS Hospital. Ranjeet Singh/PW-4 is not a CRL.A. 1248/2015 + connected matters Page 21 of 94 rustic villager but a businessman owning substantial properties whose sister was living in an area near the hospitals. He would certainly have known, like most of us, the difference between the two hospitals.

21. Ranjeet Singh/PW-4 testified having left the house of the sister at 7:15 p.m. on 22.2.2009 and on the way back had stopped at the spot where his statement was recorded at about 8:00 p.m. by Inspector S.S. Rana/PW-26. The appellants urge that the sudden appearance of PW-4 at the place of crime after 6 hours is curious and deceptive, indicative of being a planted witness. I have examined the case diary and notice that Investigating Officer S.S. Rana /PW-26 in the proceedings recorded on 22nd February, 2009, did not narrate and reproduce in detail the statement given by Ranjeet Singh /PW-4 under Section 161 of the Code. It is also apparent that the carbon paper used in relation to the page which mentions the statement of Ranjeet Singh /PW-4 is different from the carbon paper used while recording the proceedings dated 22nd February, 2009 in the case diary on the other pages. [On the question of police diary and its relevance, see *Laxmi v. State*,(2016) 155 DRJ179(DB) and *Sarvesh Kumar v. State (Govt. Of NCT of*

Delhi), (2016) 229 DLT640(DB).].

22. For the aforesaid reasons, I would accept the contention of the appellants that the eye witness assertion and identification by Ranjeet Singh /PW-4 should be discarded for his presence at the spot and at the place of occurrence is clearly questionable and unreliable. I would therefore eschew testimony of Ranjeet Singh/PW-4. CRL.A. 1248/2015 + connected matters Page 22 of 94 23. I would now refer to testimonies of Sunil/PW-1, Paramjeet/PW- 5, Varun/PW-6, and Surender/PW-8, who, as per prosecution version, had gone to Chintu Car Point and were also present in the Santro car when they were fired upon. They have identified either all or some of the appellants as persons who were present at Chintu Car Point or in the Indica Car. I would also examine the statements made by Mahendra Singh/PW-9, Hemant/PW-10, and Gajender/PW-11. Reference, wherever required, is also made to the police witnesses.

24. Sunil/PW-1 in his court deposition recorded on 6th October, 2009, affirmed that on 22nd February, 2009 he alongwith Paramjeet/PW-5, Varun/PW-6, Surender/PW-8 and the deceased Ankit had visited Chintu Car Point. As they entered the office, Mahendra Singh/PW-9 had told them that talks had concluded and they should move out. They accordingly had waited outside the office for Mahendra Singh/PW-9. Four boys were standing outside the office. Another person, namely, accused-Rajesh Pandey came out of the office and had spoken and talked with these boys, who, it appeared, belonged to the same office. Mahendra Singh/PW-9 came out and they started their vehicle to leave the place. However, there was a motorcycle parked in front of the Santro car and on this account, altercation took place between the deceased Ankit and Varun/PW-6 on one side and the four boys who were standing outside. Sunil/PW-1, Mahendra Singh/PW-9 and Paramjeet Singh/PW-5 had intervened and separated the two sides. Sunil had testified that Sushil Arora and Rajesh Pandey were sitting on the rear seat of the Indica car when firing took place, with three boys who were earlier present outside CRL.A. 1248/2015 + connected matters Page 23 of 94 Chintu Car Point. He had stated that perhaps there were five occupants in the Indica car. Sunil/PW-1 had also testified that prior to 22nd February, 2009 on 20th February, 2009, he, along with his uncle Mahendra Singh/PW-9, visited Chintu Car Point and

had also seen Rajesh Pandey and Sushil Arora, who were present there.

25. Sunil/PW-1's deposition was recorded de novo on 8th March, 2010 and on subsequent dates. The reason being that till 6th October, 2009, the appellant-Sushil Arora alone had been put to trial as other accused were absconding. Subsequently, the other four accused persons were arrested and charge-sheeted. Consequently, Sunil/PW-1 was examined afresh. In his examination on 8th March, 2010 and on subsequent dates, Sunil/PW-1 has not referred to his purported earlier visit with Mahendra Singh/PW-9 on 20th February, 2009 and his interaction with Sushil Arora and Rajesh Pandey. This is important, for if Sunil/PW-1 had interacted with Sushil Arora and Rajesh Pandey on 20th February, 2009, I should accept the prosecution version that the said witness was well acquainted and had sufficient opportunity to interact with the two appellants - Sushil Arora and Rajesh Pandey. Noticeably, Sunil/PW-1 in his statement recorded on 6th October, 2009 did not talk of presence of three or four boys at Chintu Car Point on 20th February, 2009, who later on 22nd February, 2009, were statedly present at the same place and in the Indica car and had fired. R.K. Gauba, J.

in his judgment has pointed out that statement of Sunil/PW-1 recorded on 6th October, 2009 can be read in evidence against Sushil Arora for he was represented and had been charge-sheeted and was on trial on the said date. I would not place reliance CRL.A. 1248/2015 + connected matters Page 24 of 94 and accept the statement of Sunil/PW-1 recorded on 6th October, 2009 with reference to the purported visit to Chintu Car Point with Mahendra Singh/PW-9 on 20th February, 2009 for the reasons indicated below.

26. Even on 6th October, 2009, Sunil/PW-1 had accepted, he had come to know Sushil Arora by his name only on 22nd February, 2009 and not on 20th February, 2009. In case Sunil/PW-1 had interacted and was present with Mahendra Singh/PW-9 at Chintu Car Point on 20th February, 2009, he would have known and identified appellant Sushil Arora by his name. This position was affirmed by Sunil/PW-1 in his cross-examination on 10th March, 2010, when the witness deposed that prior to the date of the occurrence, i.e., 22nd February, 2009, he had not met or seen appellant-Sushil Arora. He had not been introduced to him by his

uncle Mahendra Singh/PW-9, nor did he have any talk with Sushil Arora. He subsequently, i.e. after the incident, came to know the name of the appellant - Sushil Arora, from his uncle Mahendra Singh/PW-9. Sunil/PW-, 1 as per his own statement, on 22nd February, 2009 had merely peeped into the office of Chintu Car Point and was asked to move out by his uncle Mahendra Singh/PW-9. Another important aspect emerging from the statement of Mahendra Singh/PW-9 is that by the time Sunil/PW-1 and others in Santro car had arrived at Chintu Car Point on 22nd February, 2009, discussion with Sushil Arora in the presence of accused Rajesh Pandey and Pushkar Raj, who has deposed as DW-6, had ended in a settlement. CRL.A. 1248/2015 + connected matters Page 25 of 94 27. It is difficult to accept that Sunil / PW-1 was present in the detailed interaction of Sushil Arora on 20.2.2009 with Mahindra Singh/PW-9, yet he did not know him and was not in a position to identify him by his name. This ex facie appears to be implausible. It would as a sequitor follow that Sunil/PW-1 did not personally know Sushil Arora by his name prior to the incident. I would accordingly hold that his name, i.e, Sushil Arora's name, though mentioned in Ex.PW-1/A, was told to Sunil/PW-1 by Mahendra Singh/PW-9.

28. R.K. Gauba, J.

in his judgment has affirmatively concluded that there was acrimony and dispute, and threats were extended by Rajesh Pandey during the said discussion. Gita Mittal, J., on the other hand, has referred to the testimony of the witnesses including Sunil/PW-1 to show that there was a dispute on the question of repayment of Rs.10 lakh, but the same was amicably resolved, albeit there was an altercation between Varun/PW-6 and deceased Ankit with the boys in the parking lot on account of the motorcycle which was parked in front of the Santro car, which had blocked their way. The assertion is that three or four boys, who were present there had subsequently followed the Santro car in the Indica car and fired.

29. In other words, enunciation by the appellants-Sushil Arora and Rajesh Pandey is that the occurrence and brawl involving Varun/PW-6 and deceased Ankit which took place outside Chintu Car Point had led to the firing and they have been falsely implicated on the basis of supposition and perception of the witnesses, who

have stated that appellant Sushil Arora and Rajesh Pandey were involved and were CRL.A. 1248/2015 + connected matters Page 26 of 94 instrumental and responsible for the firing. They were not present in the Indica car.

30. Before examining testimonies of Paramjeet/PW-5, Varun/PW-6 and Surender/PW-8, I would prefer to refer to the solemn statements of Mahendra Singh/PW-9, Hemant/PW-10 and Gajender/PW-11, for clarity on what had transpired outside Chintu Car Point, and on identity and presence of the appellants Sushil Arora, Rajesh Pandey, Hemant Garg, Vishnu and Sonveer, as deposed by them.

31. Mahendra Singh/PW-9 in his deposition has testified that he had given a loan of Rs.10 lakh to appellant-Sushil Arora in June or July, 2008 and Sushil Arora had given two blank cheques without the name of the payee of Rs.5 lakh each. Subsequently, his name was written by one Saroj. Sushil Arora had agreed and paid interest @ 2% per month, but from January, 2009 interest was not paid. Mahendra Singh/PW-9's daughter's wedding was scheduled and held on 14th February, 2009 and after the wedding, he along with his nephew Sunil/PW-1 had visited the office of Sushil Arora at Chintu Car Point, Pusa Road, where accused Rajesh Pandey and his brother Pushkar Raj were also present. They were asked to come back after two days. On 22nd February, 2009, he had visited the office of Sushil Arora with his cousin Sudhir, Gajender and Hemant. Rajesh Pandey was present there along with 4-5 other boys, who were standing outside the office. Initially, appellant-Sushil Arora had expressed inability to re-pay, but finally there was an agreement and settlement with Sushil Arora agreeing to re-pay the loan @ Rs.2 lakh per month without interest. CRL.A. 1248/2015 + connected matters Page 27 of 94 Rajesh Pandey in the discussion had stated that Mahendra Singh/PW-9 was trapped and he should do what they had directed - "Tu Fasa Hua Hai Jaisa Hum Kahte Hai Vaisa Maanja". PW-9 had then called Sunil/PW-1 on his mobile phone and had asked him to come with 3-4 associates as appellant-Sushil Arora did not intend to pay any money. Thereupon, Sunil/PW-1 had come along with others, namely, deceased Ankit, Surender/PW-8, Varun/PW-6 and Paramjeet/PW-5. Sunil/PW-1 came inside the office and was told to go and wait outside as talks were going on. Subsequently, Mahendra Singh/PW-9, Sudhir,

Gajender/PW-11 and Hemant/PW-10 came out of the office and had asked Sunil/PW-1 to leave. Thereupon, quarrel took place between deceased Ankit and four boys standing outside the office as a motorcycle was parked in front of their Santro car. PW-9 had intervened and separated the two sides. Mahendra Singh/PW-9, however, could not identify whether appellants Hemant Garg, Sonveer and Vishnu were amongst 3-4 boys involved in the quarrel. In his cross-examination, PW-9 has accepted that he had developed family relationship with appellant Sushil Arora, who was invited to his daughter's wedding. He has stated that Sunil/PW-1 on 22nd February, 2009 had come inside the office for a moment and was sent out immediately. In his cross-examination, Mahendra Singh/PW-9 accepted that in his statement under Section 161 of the Code, he had not stated the exact words attributed to Rajesh Pandey as quoted above. He has also accepted that talks/discussion had concluded with appellant-Sushil Arora agreeing that he would pay Rs.10 lakh. They CRL.A. 1248/2015 + connected matters Page 28 of 94 were served tea and the entire discussion was cordial except for exchange of the aforesaid words.

32. Hemant/PW-10, who was present along with Mahendra/PW-9, Sudhir and Gajender/PW-11 at Chintu Car Point, had identified appellant Sushil Arora and that the talks had concluded between him and Mahendra Singh/PW-9. However, this witness could not recollect the exact month, and had stated it was the 22nd day and a Friday. After two days, PW-10 had again visited Chintu Car Point with Mahendra Singh/PW-9, Gajender/PW-11 and Sunil/PW-1. At that time, there was an exchange of words between appellant Sushil Arora and his brother Puskar Raj, DW-6 on one side, and Mahendra Singh/PW-9 on the other. Appellant Rajesh Pandey was also present and had threatened. Appellant Sushil Arora had agreed to pay the principal amount without interest. Three-four boys were standing outside Chintu Car Point and Rajesh Pandey was in constant touch and conversing with those boys, who were coming in and going out of the office. In the meanwhile, Sunil/PW-1, deceased Ankit, Paramjeet/PW- 5 and another boy whose name PW-10 could not recall also came to Chintu Car Point and were asked to stand outside the office. There was a quarrel between the boys who were standing outside the office and Sunil and his boys, which they had quelled. They had left Chintu Car Point in two separate cars with Sunil/PW-1 and other boys going in the

black Santro car. They had reached Hyat Regency, Bhikaji Cama Place, when Mahendra Singh/PW-9 had received a telephone call from Sunil/PW-1 that someone had fired on them and Ankit had suffered bullet injury. He identified Vishnu and Sonveer, who were CRL.A. 1248/2015 + connected matters Page 29 of 94 present in the Court, not by name, albeit as those who were present outside the office of Chintu Car Point on the date of occurrence. In his cross-examination, Hemant/PW-10 has accepted that talks had concluded in a settlement on 22nd February, 2009 and only 4 persons were present in the office, whereas four boys, namely, Sunil/PW-1, Ankit etc. were present outside. The quarrel and tiff outside Chintu Car Point had lasted for 2-3 minutes. Except Sunil/PW-1, who had entered the office for just one minute and was asked by Mahendra Singh/PW-9 to stay outside, others, namely, deceased Ankit, Paramjeet/PW-5 or their friends had not come inside the office.

33. Gajender Singh/PW-11 has similarly testified about his visit with Mahendra Singh/PW-9, Hemant/PW-10 and Sudhir to the appellant Sushil Arora's office at Chintu Car Point on 22nd February, 2009. Four-five boys were standing outside the office. Appellant- Sushil Arora along with his brother Pushkar Raj/DW-6 and one or two persons, whose names he did not remember, were present in the office. Appellant-Rajesh Pandey was sitting inside the office and had stated that "they did not know him" and that "he was Rajesh Pandey". Talks had ended in a settlement with appellant-Sushil Arora agreeing to pay the principal amount without interest in monthly instalments of Rs.2 lakh each. They had got up and moved out, when there was a quarrel between deceased Ankit and Varun/PW-6 on the one side and the four boys, who were standing outside, on the issue of removing the motorcycle. They had by then sat in the car. They came out and got the two groups separated. Subsequently, they had left and had reached Hyatt Hotel, when Mahendra Singh/PW-9 received a telephone call CRL.A. 1248/2015 + connected matters Page 30 of 94 from Sunil/PW-1 about the firing by occupants of an Indica car. He identified Sonveer and Vishnu, who were present in the Court, as two amongst the 4-5 boys, who were present outside Chintu Car Point. In his cross-examination, PW-11 had accepted that only he and Mahendra Singh/PW-9 had gone inside the office of Chintu Car Point, which gives an impression that Hemant/PW-10 had not gone inside. However, I am not inclined to accept the said

version in view of the earlier statement of PW-11 that Hemant/PW-10 had gone with them to Chintu Car Point and testimony of Hemant/PW-10 and Mahendra Singh/PW-9. He has accepted that talks inside Chintu Car Point had ended in an amicable settlement and there was no quarrel inside Chintu Car Point. Further, only Sunil/PW-1 had come inside the office but he was immediately asked to go outside by Mahendra Singh/PW

Others, who had come with Sunil/PW-1, had not come inside the office.

34. Thus, Hemant/PW-10 and Gajender/PW-11 had identified appellants Sonveer and Vishnu as being present outside Chintu Car Point.

35. This brings us to the statement on oath of Paramjeet Singh/PW- 5 on the question of identity of the accused present at Chintu Car Point on 22nd February, 2009 and in the Indica car, which had fired on the Santro car. PW-5 had correctly identified appellants Sushil Arora and Rajesh Pandey as well as Sonveer, Vishnu and Hemant Garg and stated that they were present in the Indica car which had fired. He had identified Sonveer, Vishnu and Hemant Garg, whose names he came CRL.A. 1248/2015 + connected matters Page 31 of 94 to know later on, as persons present outside Chintu Car Point. He had seen Varun/PW-6 having a physical brawl with the three boys. Ankit got down from the car and had proceeded towards them. They also got down from the vehicle and had separated Varun/PW-6 from the three boys. The brawl had lasted for 1-2 minutes. I would not doubt presence of Paramjeet Singh/PW-5 for the Santro car bearing number DL2F-FK-0002 belonged to him and he was statedly driving the said car. His presence has been deposed to and affirmed by other witnesses, namely, Sunil/PW-1, Varun/PW-6, Surender/PW-8, Mahendra/PW-9, Hemant/PW-10 and Gajender/PW-11.

36. Paramjeet/PW-5 claims that he had gone inside the office and was asked by Mahendra Singh/PW-9 to wait outside. However, I would not read the said version of PW-5 as a statement that he had seen appellants Sushil Arora and Rajesh Pandey inside Chintu Car Point. This assertion would reflect that he was deposing on the basis of what was stated to him by Sunil/PW-1 and is an overstatement. In his cross-examination, PW-5 was confronted with his statement under Section 161

of the Code marked Ex.PW-5/D1, wherein it was not recorded that he had not gone inside Chintu Car Point. Mahendra Singh/PW-9, Sunil/PW-1, Hemant/PW-10 and Gajender/PW-11 have deposed that only Sunil/PW-1 had come and peeped inside the office and was asked to stand outside by PW-9. We shall subsequently deal with the failure of PW-5 to identify accused Hemant Garg in the Test Identification Parade on 26th August, 2009 and the effect thereof on the dock identification of Hemant Garg as the driver of the Indica car. CRL.A. 1248/2015 + connected matters Page 32 of 94 37. I would also discount the version of PW-5 that he had seen the Indica car arrive outside Chintu Car Point for this fact is not deposed to by any other witness, Sunil/PW-1, Varun/PW-6, Surender/PW-8, Mahendra Singh/PW-9, Hemant/PW-10 or Gajender/PW-11. This fact is also not recorded in the statement given by PW-5 under Section 161 of the Code marked Ex.PW-5/D1 as is clear from the cross- examination of PW-5 on 20th April, 2010.

38. PW-5 has testified that appellant Sushil Arora and Rajesh Pandey were travelling in the rear seat of the Indica car and had uttered the words "Maro salo ko" and used abusive language. This has not been testified by any other witness. I would treat this version as another exaggeration made by PW-5 in order to implicate appellants Sushil Arora and Rajesh Pandey. On the question of presence of appellants Sushil Arora and Rajesh Pandey in the Indica car, I have subsequently examined and considered the evidence and material on record.

39. Paramjeet/PW-5 has stated that Mahendra Singh/PW-9 was travelling in "Verna" car, whereas other witnesses have described the car being used by Mahendra Singh/PW-9 as Esteem. This minor variation, in my opinion, cannot be a ground to disbelieve and reject the entire testimony of Paramjeet Singh/PW-5. "Verna" and "Esteem", it is common knowledge, are mid segment cars manufactured by two different companies. Minor confusion as to the name of the car cannot be a ground to completely reject the testimony of PW-5. CRL.A. 1248/2015 + connected matters Page 33 of 94 40. Varun/PW-6 in his deposition has affirmed that he along with Sunil/PW-1, Paramjeet Singh/PW-5, Surender/PW-8 and deceased Ankit on 22nd February, 2009 had gone to Karol Bagh and had reached Chintu Car Point in Santro car and were standing outside. After some time Mahendra Singh/PW-9 came out of the Chintu Car Point office and they were

to leave the place. Varun/PW-6 and deceased Ankit on one side and the four accused, namely, Rajesh Pandey, Vishnu, Sonveer and Hemant Garg, who were present in the Court, had a brawl over the issue of taking out of vehicle. Mahendra Singh/PW-9 had intervened. Five of them thereafter left in the Santro car and had proceeded towards Budha Garden (Budha Jayanti Park) with PW-5 at the driver's seat. They had stopped near a cold drink cart to buy water and cold drink. In the meanwhile, one Indica car silver colour bearing number 2192 had overtaken them and fired shots at their vehicle. One shot had pierced the fixed small glass behind rear side window glass and hit Ankit below his armpit as he was sitting on the right side rear seat of the car. They moved their vehicle but had to stop at the traffic light as there was a traffic jam. They took their vehicle on the left side of the road, got down and started running. Sonveer and Vishnu were identified by Varun/PW-6 in the Court as the occupants of the Indica car who had fired at them. These two had taken out the upper halves of their bodies from the Indica car while firing at them. At a traffic light, one bullet had hit Ankit and another had hit Surender/PW-8. Ankit had fallen near the Santro car. Varun/PW-6 had also identified accused Hemant Garg as the driver of the Indica car, not by name, as he was not familiar with his name, but CRL.A. 1248/2015 + connected matters Page 34 of 94 by identifying him. In his examination in chief, PW-6 had indicated that there were two more persons in the Indica car, but he was unable to see them. Varun/PW-6 was declared hostile and in his cross-examination by the Additional Public Prosecutor, he accepted that Mahendra Singh/PW-9 had gone to Chintu Car Point to collect Rs.10 lakh. Further, he had come to know the name of accused Rajesh Pandey as he was being addressed as such and he had seen him coming in and going out of the Chintu Car Point office and communicating with other persons present outside. He then accepted that Rajesh Pandey was present in the Indica car with accused Vishnu, Sonveer and Hemant Garg. However, he did not identify and state that appellant Sushil Arora was present in the Indica car with the accused persons, though, he was confronted with his statement under Section 161 of the Code dated 8th July, 2009 marked Ex.PW-6/PB. In his cross-examination on behalf of accused-Rajesh Pandey, Varun/PW-6 has accepted that no person from the office of Chintu Car Point had come out when there was physical scuffle, which had lasted around 5-7 minutes. None of them had received any physical injury in the

altercation outside Chintu Car Point. He had difficulty in getting down from the Santro car as the left side door had got stuck against a tree. PW-6 in the cross-examination, had testified that there were two other persons in the Indica car but he could not identify them. On Court question, PW-6 admitted that he had no prior acquaintance with Sonveer and Vishnu and had seen them at Chintu Car Point along with others. CRL.A. 1248/2015 + connected matters Page 35 of 94 41. Surender/PW-8, the injured, has testified being present outside Chintu Car Point, which place they had visited as Mahendra Singh/PW-9 had to collect Rs.10 lakh from a person named Sushil Arora. Three-four other persons were present outside the office. Mahendra Singh/PW-9 came out at about 1.00-1.15 P.M. and thereafter, they decided to leave. As there was a motorcycle in front of the Santro car, deceased Ankit and Varun/PW-6 had asked 3-4 boys to move the motorcycle. There was an exchange of words and thereafter a physical altercation between them. Mahendra Singh/PW-9 and Sunil/PW-1 had intervened and got them separated. They, namely, Sunil/PW-1, Varun/PW-6, Paramjeet/PW-5 and he, i.e., Surender/PW- 8 along with deceased Ankit sat in the Santro car and had proceeded towards Budha Garden side and had stopped to buy cold drink/water from a cart vendor. In the meanwhile, an Indica car overtook them from behind. Bullets were fired and one bullet had pierced the small fixed glass near the rear right side door of the Santro car and had hit Ankit below his armpit. Two boys in the Indica car had firearms and had fired. One boy, who was sitting on the left side, had taken out his upper body. The second boy was on the rear left side window seat in the Indica car. There were 4-5 occupants in the Indica car. He could not give their names, but had identified Sonveer and Vishnu as the two boys who had fired. He also identified Hemant Garg as the person who was driving the Indica car. PW-8 in his examination in chief was somewhat ambivalent as he did not specifically depose on the presence of Hemant Garg amongst the boys with whom there was a quarrel outside Chintu Car Point. However, in his cross examination CRL.A. 1248/2015 + connected matters Page 36 of 94 by counsel for Hemant Garg on 08/02/2010, PW-8 categorically denied the suggestion that the appellant Hemant Garg was not present at Chintu Car Point, or he was not driving the car at the time of incident or that he had wrongly identified him at the instance of the police. Surender/PW-8 had stated that there were one or two more boys in

the Indica car but he was unable to see them and, hence, could not identify them with certainty. To save themselves, they had driven away but had to stop at the red light. They got down from the car and ran. A firearm bullet had hit him below his waist. Ankit was sitting on the rear seat and had got down and was hit by a bullet.

42. The Appellants submit that Surender/PW-8 was not an injured eye witness and has been introduced and engrafted. He was not present and was never injured or the injury was self-inflicted. Referring to the cross-examination on behalf of Vishnu and Sonveer conducted on 07.09.2010, it was submitted that the conduct of Surender/PW-8, who claimed profuse and extensive bleeding throughout and while travelling by bus, but did not take immediate and available medical aid and assistance at AIIMS and had purportedly proceeded to the office at Mehrauli and then came to AIIMS for treatment, was implausible and unnatural conduct. My attention was also drawn to the forensic reports/Exh. HC-A, Exh. HC- B, and Exh. HC-C, as per which the clothes worn by Surender/PW-8 did not have the bullet hole or charring. Further, as per the MLC of Surender/PW-8 marked Ex.PW-39/A, there was charring around the wound indicative that the firing had taken place from a close range. Lastly, the MLC of Surender/PW-8, Ex. PW-39/A, records the place CRL.A. 1248/2015 + connected matters Page 37 of 94 of occurrence as Connaught Place and not T-Point, Simon Bolivar Marg.

43. It is correct that the clothes worn by Surender/PW-8 were not produced and as per the forensic report Exh. HC-C, no bullet hole was found, but this is explainable in view of the place of the wound/injury. Surender/PW-8 was hit by the fire arm bullet on his left side below waist near his hip. Thus, absence of hole etc. on the clothes could be explained. Similarly, description of the place of occurrence or the site of crime as Connaught Place as recorded in the MLC Ex.PW-39/A cannot be a ground to disbelieve Surender/PW-8. Connaught Place was not the exact location, but was not too far from the place of firing. Surender/PW-8 was a conductor working with Sunil/PW-1. He was not a man of means and did not possess even a mobile phone. He had gone to Chintu Car Point as per the instructions given by Sunil/PW-1 as his employer's uncle Mahendra Singh/PW-9 had given a loan of Rs.10 Lacs which was to be recovered. Description would well reveal and indicate

lack of knowledge and awareness of road names, location, and more importantly absence and lack of collusion and deliberation between him and others present. It discloses spontaneity.

44. Surender/PW-8 was certainly admitted to the Trauma Centre of AIIMS as per MLC Ex.-PW39/A on 22.02.2009 at 4:00 p.m., i.e. nearly two hours after the occurrence. PW-8 had a round wound over his left hip region about 1 centimetre in diameter with some charring around the wound. Charring would indicate firing from a close range, which was possible. It is apparent that the projectile had grazed past his hip, giving the charring effect. Charring is not contrary and antithesis of the prosecution version or PW-8's testimony. PW-8 was examined by Dr. Anindaya/PW-39 who has also deposed about the tenderness around the injury and has stated that the patient could remain alive for three hours after sustaining this kind of injury. Police Control Room records Ex. PW29/A and Ex. PW30A also affirm PW-8's admission in the hospital and that he had suffered injury in the occurrence. Assertion by Surender/PW-8 that he was bleeding profusely yet had travelled in bus as from place of occurrence to Mehrauli, etc. was not made in the examination-in-chief. It is only in the cross examination that Surender/PW-8 had stated that he was bleeding profusely while running to catch the bus and was bleeding even when he had boarded the bus. On further cross-examination, PW-8 had professed that there was blood on the seat of the bus and his clothes were soaked in blood but nobody asked him why was he bleeding. However, PW-8 had accepted that the bleeding had stopped by the time he had reached AIIMS. It is difficult to perceive that the bleeding would stop on its own without medical intervention. I would hold that Surender/PW-8's version on bleeding is an exaggeration and an overstatement made in his cross-examination and this part has to be discarded. The attempt under cross-examination was to magnify and overstate the extent of injury suffered. PW-8 did stretch and exaggerate, but this would not be a ground to propound and hold that he was a planted witness.

45. As per the serological report Ex.HC-C2, human blood of group 'A' was found on Ex.C-14(b) i.e. underwear statedly worn by CRL.A. 1248/2015 + connected

matters Page 39 of 94 Surrender/PW-8. Similarly, human blood was found on the pant worn by Surrender/PW-8, but blood group could not be ascertained for want of reaction. Blood group of Ankit was also 'A' but this would not mean, as asserted, that the human blood found on the pant and blood of group 'A' found on the underwear of Surrender/PW-8 must have been of Ankit.

46. I would therefore reject the appellants' contention that Surrender/PW-8 was not present in the Santro car at the time of the occurrence and the injury as reflected in the MLC Ex.39/A was either not there or was self-inflicted. These contentions are untenable and unacceptable.

47. Before I specifically examine evidence, ocular and documentary, against each of the appellants, I would deal with some of the contentions relating to First Information Report (FIR, for short), inquest report, and common intention.

48. I begin by referring to the FIR/Ex.PW25/A. Sunil/PW-1 in his complaint marked Ex.PW-1/A, which was converted into the FIR marked Ex. PW25/A, refers to the presence of Sushil Arora and Rajesh Pandey at Chintu Car Point and that 3-4 boys, who were standing outside Sushil Arora's office and were coming in and going out of the office. The complaint Ex. PW1A records that these boys were also present on 20th February, 2009, when Sunil had visited the same office with his uncle Mahendra Singh/PW-9 and had met Sushil Arora and Rajesh Pandey. While taking out the car on 22nd February, 2009, Varun/PW-6 had an altercation with 3-4 boys as a motorcycle CRL.A. 1248/2015 + connected matters Page 40 of 94 was obstructing their car and there was a scuffle between them. Sunil had intervened and thereafter they drove away. The complaint names Sushil Arora and Rajesh Pandey as occupants of the Indica car with three other men with whom altercation had taken place and that both Sushil Arora and Rajesh Pandey, were present in the Indica car at the time of firing, along with three men. Names of the other occupants in the Indica car were not stated.

49. It was submitted that the FIR should have been registered on the basis of the complaint or statement made by Manveer Singh/PW-2, who was the first one to have called the Police Control Room from his mobile and had informed them about the firing and involvement of grey colour Indica car bearing number 2192. It was

submitted that Inspector S.S. Rana/PW-26 and Inspector Jagat Singh/PW-47 of Police Station-Chanakya Puri had deliberately refused to accept Manveer/PW-12 presence at the place of occurrence, though this stands recorded in the call records and accepted by Manveer Singh/PW-2. I would accept that Manveer Singh/PW-2 was present at the spot and would have met Inspector S.S. Rana/PW-26 and Inspector Jagat Singh/PW-47. However, it would not be a good ground or justification to discard and treat the FIR/Ex.PW-25/A based on Sunil's/PW-1's statement marked Ex. PW-1/A, as invalid and bad in law. Police had to move with alacrity and both Inspector S.S. Rana/PW-26 and Inspector Jagat Singh/PW-47 had promptly proceeded to Trauma Centre, AIIMS to ascertain facts and get information and know well being of the victim. This was solicitous and should be appreciated. Till then, the police was unaware of the CRL.A. 1248/2015 + connected matters Page 41 of 94 name and identity of the victim, his condition and other details. On reaching the hospital they had met Sunil/PW-1, who was with the victim deceased-Ankit in the Santro car. There was nothing wrong or illegal in the Investigating Officer Inspector S.S. Rana/PW-26 recording the statement, Ex.PW-1/A of Sunil/PW-1 and thereafter converting the same into the FIR, Ex.PW-25/A.

50. There is divergence of opinion between Gita Mittal J.

and R.K. Gauba, J., on the alleged delay in the registration of FIR and on failure to lead evidence that the FIR upon registration was duly communicated and sent to the Magistrate.

51. It emerges that the firing incident had taken place at about 2:00 p.m. and Ankit Minocha was thereafter admitted to Trauma Centre at AIIMS as per MLC/Ex.PW-50/A at 2:20 p.m.. FIR as per the prosecution version was recorded on the basis of the statement made by Sunil/ Ex.PW-1/A at Police Station Chanakya Puri, at about 19:00 hours, after a time gap of about 5 hours. This time gap, I would observe, is not substantial. Evidence reveals that the police had proceeded and acted swiftly and with adroitness in reaching the place of occurrence and had then proceeded to Trauma Centre, AIIMS. Recording of the statement (Rukka), sending of the Rukka to the Police Station and thereafter registration of the FIR would

necessarily take time. ASI Om Prakash /PW-25 had recorded the said FIR on the basis of Rukka and thereafter had sent the said Rukka to Inspector S.S. Rana/ PW-26. He proved the daily diary entry bearing DD No.21A and 22A marked Ex. PW-25/B and Ex-PW25/C. The said Rukka was CRL.A. 1248/2015 + connected matters Page 42 of 94 brought by Constable Satpal /PW-15, who had joined investigation with Inspector, SHO Jagat Singh /PW-47 and had at first reached the traffic light at Budha Garden, Ridge Road and thereafter proceeded to AIIMS Trauma Centre. Cross-examination of Constable Satpal/ PW- 15 which is fairly in detail and extensive, would reveal that he was not specifically confronted and questioned on the ante timing of the FIR or the delay. In the cross examination, the suggestion given was that on the same day itself the witness had visited Chintu Car Point at Pusa Road and had met Pushkar Raj/ PW-6. A clear indication that the statement of Sunil marked Ex.PW-1/A and the FIR had named Sushil Arora and had referred to Chintu Car Point. ASI Om Prakash/ PW-25 was hardly cross-examined and no effective suggestion was given to show and establish that the FIR was ante timed. I would therefore agree that the five hours delay in registration of FIR given the aforesaid facts and circumstances with events happening at a fast pace, cannot be termed as belated. However, I would accept the argument and contention of the appellants that even if the FIR was not ante timed and was not delayed, the question of the truth and falsity of the assertions made therein is a separate aspect.

52. On the third aspect again I would agree with the view taken by R.K. Gauba J.

in his judgment that assuming that there was delay in compliance with Section 157(1) of the Code in forwarding the copy of FIR to Illaqa Magistrate, this would not demolish or denounce the trustworthy evidence on record, as has been held in *Munshi Prasad Vs. State of Bihar*, (2002) 1 SCC351 and *Bhajan Singh @ Harbhajan Singh and Ors. Vs. State of Haryana*, (2011) 7 SCC421 There is no CRL.A. 1248/2015 + connected matters Page 43 of 94 rule of law that the prosecution must fail and result in acquittal if the prosecution fails to establish receipt of the report under Section 157 (1) of the Code at the end of the Magistrate. Similarly, I would record and reject that the delay in preparation of inquest papers in the facts of the present case would help the defence and result

in acquittal. Homicidal death of Ankit, time of occurrence and death, cause of death and that the perpetrators had fired from the Indica car, are facts beyond realm of debate and doubt.

53. I must reject the argument of Hemant Garg, Rajesh Pandey and Sushil Arora that Section 34 of the IPC would not be attracted and applicable to the occupants of the Indica car, for mere occupation of the car would not show and establish common intention. In the facts and circumstances of the present case, the said contention is flawed and should be outright rejected. This is a case wherein the occupants of the Santro car had left and driven away from Chintu Car Point. They had stopped to have water and cold drink from a cart parked near the Buddha Jayanti Park. The said Santro car, however, was pursued and waylaid by an Indica car, which was being driven at a great speed. Two of the occupants, as noticed below, were armed with firearms. They overtook the parked Santro car standing to purchase cold drink/water. Occupants from the front and rear window on the left side of the Indica car had fired bullets at the occupants of the Santro car. The occupants of the Santro car, to save themselves, drove and moved ahead but could not escape and had to stop in view of the congestion at the red light. In the process, a minor accident took place. Indica car followed the Santro car and thereafter, the second round of C.R.L.A. 1248/2015 + connected matters Page 44 of 94 firing took place. As per the statement of Manveer Singh/PW-2, two or three occupants of the Indica car got down and had fired. Someone at that time was at the steering wheel of the Indica car. The facts would reveal that this is a case wherein the Indica car with two persons armed with weapon, had deliberately and intentionally followed the Santro car with a desire and purpose to cause injuries, had fired. It is not a case wherein there was a sudden quarrel and fight without common intent of other occupants of the Indica car, one or more had brandished the firearms, which were in their custody, to fire and kill one and injure a third person. Regardless of whether the other occupants of the car had made any statement or not, the impelling facts would disclose a concerted and deliberate intent to follow the Santro car and fire at the occupants of the said car. Driver of the Indica car, because of his overt act in driving the car, would be attributed with common intention. Others present in the car, even if not involved in the firing, would be attributed for their common intention, for their presence in the car would

indicate and reflect this intention, knowing the prior animosity be the money dispute or quarrel or brawl, which had taken place shortly before.

54. At this stage I would also take on record the dates on which each appellant was arrested and dates when the chargesheets were filed. S.S. Rana/ PW-26 had arrested Sushil Arora on 24th February, 2009. Charge-sheet against him was filed by the prosecution on 23rd May, 2009 and the case was committed to the Court of Sessions vide order dated 4th August, 2009. Hemant Garg, Sonveer, and Vishnu were arrested on 10th August, 2009, 27th August, 2009 and 29th September, 2009 respectively. First supplementary charge-sheet was filed against them on 24th October, 2009. Rajesh Pandey was the last person to be arrested on 11th November, 2009. Consequently the second supplementary charge-sheet was filed on 2nd January, 2010. Charges against Sushil Arora were framed on 22nd August, 2009, whereas charges against other four appellants were framed on 29th January, 2010.

55. I would now examine evidence against each of the appellants on their presence in the Indica car and whether prosecution has been able to establish their case against each one of them, beyond doubt. As noticed above, names of the appellants Sushil Arora and his friend Rajesh Pandey figure in the FIR and were mentioned by Sunil/PW-1 in his statement marked Ex. PW-1/A. Names of accused Sonveer and Vishnu or for that matter Hemant Garg, did not figure in the FIR or the statement marked Ex. PW-1/A. Hemant Garg, Sonveer, and Vishnu 56. Appellant-Hemant Garg is the registered owner of Indica car bearing number DL3AX2192, a fact accepted by him in his statement under Section 313 of the Code and by his wife Shalini who had appeared and deposed as defence witness DW-2.

57. Hari Shah/PW-31 from the Transport Department, Saket had stated that car bearing No.DL-3CAX2192 was registered in the name of the appellant, Hemant Garg. He had produced computerized print out which were marked Ex.PW-31/A. No doubt PW-31 in his cross- examination has stated that the request from the police to provide the CRL.A. 1248/2015 + connected matters Page 46 of 94 details was received on 23rd May, 2009, and photocopy of the said request has been

exhibited as Ex.PW-31/DA, there is sufficient material on record to show that the police had started investigation on the involvement of Hemant Garg immediately after the occurrence and had even visited his residence.

58. Ownership details of the said car had come to the knowledge of the police on the basis of computerised records as deposed to by Inspector Jagat Singh/PW-47, the SHO of Police Station Chanakya Puri and Inspector S.S.Rana/PW-26, who was the first Investigating Officer. Inspector Jagat Singh/PW-47, who was involved with the investigation, in his cross-examination has stated that they had visited the house of Hemant Garg, owner of the Indica car on 23rd February, 2009, which is a day before the appellant-Sushil Arora was arrested on 24th February, 2009.

59. Prosecution had filed application dated 20th March,2009 seeking issuance of non bailable warrants against Hemant Garg, which was allowed by the Metropolitan Magistrate on 24th March, 2009.Subsequently, Hemant Garg had applied for anticipatory bail vide application dated 17th April,2009, which was rejected vide order dated 20th April, 2009 passed by the Additional Sessions Judge.

60. Hemant Garg was involved in a case FIR No.535/2002 under Sections 365,366 and 376 IPC of PS Timar Pur and having jumped bail was a proclaimed offender wanted by law. Hemant Garg surrendered in this case on 6th August,2009 and had moved an application through his wife stating, inter alia, that he wanted to CRL.A. 1248/2015 + connected matters Page 47 of 94 surrender with a request for Test Identification Parade (TIP, for short) in the present case.

61. Inspector Arun Kumar / PW-48/A, who took over investigation of the case on 9th July, 2009 has stated that he had moved an application for TIP of Hemant Garg on 7th August, 2009 after he came to know that Hemant Garg was in judicial custody in FIR No.535/2002 Police Station Timarpur under Sections 366/3 IPC. The application for TIP was allowed on 10thAugust, 2009 by the Metropolitan Magistrate and Hemant Garg, who had appeared in muffled face, was sent to the judicial custody on being arrested in the present FIR.

62. On 26th August, 2009, TIP was conducted by Mr. Jitender Mishra, Metropolitan Magistrate /PW-35. Ranjeet Singh/PW-4 and Paramjeet Singh/ PW-5, however, failed to identify Hemant Garg vide reports Ex.PW-4/D2 and Ex.PW-5/D2 respectively. The prosecution accepts that two witnesses namely, Sunil /PW-1 and Surender/PW-8 had also been summoned to Tihar Jail for the TIP of Hemant Garg on 26th August, 2009. Mr. Jitender Mishra /PW-35, Metropolitan Magistrate in his testimony has not stated or confirmed about the presence of Sunil /PW-1 and Surender /PW-8 and why they did not participate in the TIP held on 26th August, 2009. Counsel for the appellant Hemant Garg has vociferously, with some merit, questioned the prosecution and their failure to conduct TIP of Hemant Garg on 26th August, 2009 by Sunil /PW-1 and Surender /PW-8. Inspector Arun Kumar/PW-48/A in his testimony has accepted that Ranjeet CRL.A. 1248/2015 + connected matters Page 48 of 94 Singh/PW-4 and Paramjeet Singh/ PW-5 had failed to identify Hemant Garg on 26th August, 2009 and that on 27th August, 2009 another application for TIP of Hemant Garg by Sunil /PW-1 and Surender /PW-8 marked Ex.PW-49/C, was moved. However, in his cross- examination by counsel for Hemant Garg, Arun Kumar/PW-48/A has accepted that in the first application filed for TIP, which was held on 26th August, 2009, he had mentioned that the TIP of Hemant Garg was conducted by four witnesses and the said witnesses including Sunil /PW-1 and Surender /PW-8 had been directed to come for TIP. He had claimed that Sunil /PW-1 and Surender /PW-8 could not participate the TIP on 26th August, 2009 as the Metropolitan Magistrate, i.e., Mr. Jitender Mishra/ PW-35 having conducted TIP by two witnesses, had directed him to move a fresh application for remaining two witnesses. The said version given by PW-48/A is debatable. However, it is equally correct that Sunil /PW-1 and Surender /PW-8 in the TIP conducted on 28th August, 2009 before Mr. Surya Malik Grover / PW-44, Metropolitan Magistrate, had identified Hemant Garg vide Ex.PW-44/A and Ex.PW-44/A1. On the question of identification in the TIP proceedings before Mr. Surya Grover Malik/PW-44, Hemant Garg had stated that the TIP was conducted at the instance of the Investigating Officer to falsely implicate him as he was shown to the witness and TIP was against law as he was not asked to change his position. At the same time, undeniably, Hemant Garg had participated in the second TIP proceedings, Ex. PW-44/A and Ex. PW-44/A1, without demur and

protest. Hemant Garg was sent to judicial custody on 10th August, 2009 and even earlier was in judicial CRL.A. 1248/2015 + connected matters Page 49 of 94 custody. Order granting police remand of Hemant Garg was passed on 29th August, 2009 after the second TIP was conducted on 28th August, 2009. If Hemant Garg had been shown to the witnesses Sunil/PW-1 and Surender/PW-8 at any time before the second TIP, he would have protested, which would have been recorded in the TIP proceedings by PW-44. It would not be therefore appropriate to per-se reject the TIP on 28th August,2009 as being dishonest, managed and inconsequential.

63. Hemant Garg was identified by Sunil/PW-1 and Surender/PW-8 in the court. Varun/PW-6 had also identified him in the court.

64. Shalini, wife of Hemant Garg, who had appeared as DW-2, has accepted that Hemant Garg was the owner of the Indica car number DL-3CAX-2192. DW-2 has claimed that her husband, Hemant Garg, did not know how to drive and they used to have a driver named Ankur. DW-2 herself knew how to drive and had produced her driving licence. Pertinently, the driver was never produced in the Court, though it was claimed by DW-2 that she used to pay Rs.3,000/- per month to the driver. As per DW-2, Hemant Garg used to have a shop of pearls etc. at Beedanpura, Karol Bagh, New Delhi. Hemant Garg in his statement under Section 313 of the Code had stated that he had given his car to Yoginder @ Vikas s/o Raj Kishore on 22nd February, 2009 for the purpose of sale as he wanted to purchase a new car. At the time of occurrence, he was at his shop at 10/2444, Beadon Pura, Karol Bagh. He did not know how to drive and his wife Shalini used to drive the car. Order dated 20th April, 2009 rejecting Hemant Garg's CRL.A. 1248/2015 + connected matters Page 50 of 94 application for anticipatory bail, does not note any contention that Hemant Garg did not know how to drive. It however records the contention of Hemant Garg that he had given the Indica car to Yogender Yadav, but was unable to state since when. Inspector S.S. Rana in his reply dated 4th April,2009 to an application filed regarding Yogendra had stated they had interrogated him as he was in contact with Hemant Garg on telephone on the date of occurrence. Evidence of Shalini DW-2 or the version of Hemant Garg of not knowing driving or that they had engaged the driver Ankur would falter and is

completely inconsistent with the testimony of the eye witnesses Sunil /PW-1, Paramjeet Singh /PW-5, Varun /PW-6, Surender /PW-8, to the effect that Hemant Garg was driving the Indica Car. Plea of alibi raised by Hemant Garg that he was not physically present at the particular place at the time of commission of the offence but was present at that point of time at another place has to be established by the accused with absolute certainty so as to exclude possibility of his presence at the place of occurrence. When the prosecution has been able to discharge their burden and establish by reliable evidence presence of an accused at the scene of crime, then the court would be slow to accept counter allegation, unless the accused adduces evidence of quality and standard that reasonable doubt would arise. Burden on the accused in such circumstances is heavy.(See Binay Kumar Singh V/s State of Bihar, (1997) 1SCC283.

65. Submission on behalf of Hemant Garg predicated on statement of Shalini/DW-2 viz. mobile Sim No.9999010588 and call record CRL.A. 1248/2015 + connected matters Page 51 of 94 details,Ex. PW49/DS, as rightly observed by R.K.Gaba J.

is of no help as one can use the mobile phone even while driving.

66. On the aspect of dock identification, the Supreme Court in Ashok Debbarma @ Achak Debbarma Vs. State of Tripura 2014 (3) SCALE344has referred to earlier case law on the subject of TIP and dock identification and has observed:

"20. We have gone through the oral evidence of PW10and PW13and, in our view, the trial court and the High Court have rightly appreciated their evidence and the involvement of the appellant in the above incident, including the fact that he had fired at various people, which led to the killing of relatives of PW10and PW13 We are of the view that since the accused persons were known to the witnesses and they were identified by face, the fact that no test identification parade was conducted at the time of investigation, is of no consequence. The primary object of the test identification parade is to enable the witnesses to identify the persons involved in the commission of offence(s) if the offenders are not personally known to the witnesses. The whole object behind the test identification parade is really to find whether or not the suspect is the real offender. In Kanta Prashad v. Delhi Admn. [AIR 1958 SC350:

1958. Cri LJ698 , this Court stated that the failure to hold the test identification parade does not make the evidence of identification at the trial inadmissible. However, the weight to be attached to such identification would be for the court to decide and it is prudent to hold the test identification parade with respect to witnesses, who did not know the accused before the occurrence. Reference may also be made to the judgment of this Court CRL.A. 1248/2015 + connected matters Page 52 of 94 in Harbajan Singh v. State of J&K [(1975) 4 SCC480: , Jadunath Singh v. State of 1975 SCC (Cri) 545]. U.P. [(1970) 3 SCC518:

1971. SCC (Cri) 124]. and George v. State of Kerala [(1998) 4 SCC605:

1998. SCC (Cri) 1232]. . basis of of an conviction 21. The abovementioned decisions would indicate that while the evidence of identification of an accused at a trial is admissible as substantive piece of evidence, it would depend on the facts of a given case as to whether or not such a piece of evidence can be relied upon as the sole accused. In Malkhansingh v. State of M.P. [(2003) 5 SCC746:

2003. SCC (Cri) 1247]. , this Court clarified that the test identification parade is not a substantive piece of evidence and to hold the test identification parade is not even the rule of law but a rule of prudence so that the identification of the accused inside the courtroom at the trial can be safely relied upon. We are of the view that if the witnesses are trustworthy and reliable, the mere fact that no test identification parade was conducted, itself, would not be a reason for discarding the evidence of in Dana Yadav [Dana those witnesses. This Court Yadav v. State of Bihar, (2002) 7 SCC295:

2002. SCC (Cri) 1698]. has examined the points on the law at great length and held that: (SCC p. 316, para

38) (c) The evidence of identification of an accused in court by a witness is substantive evidence whereas that of identification in test identification parade is, though a primary evidence but not substantive one, and the same can be used only to corroborate the identification of the accused by a witness in court. CRL.A. 1248/2015 + connected matters Page 53 of 94 So far as the present case is concerned, PW10and PW13have identified the accused in open court which is the

substantive piece of evidence and such identification by the eyewitnesses has not been shaken or contradicted. The trial court examined in detail the oral evidence tendered by those witnesses, which was accepted by the High Court and we find no error in the appreciation of the evidence tendered by those witnesses."

Recently, in Mohd. Sajjad @ Raju @ Salim Vs. State of West Bengal Criminal Appeal No.1953/2010 decided on 6th January, 2017, the Supreme Court has referred to an earlier decision in Lal Singh Vs. State of U.P.(2003) 12 SCC554 wherein it has been held as under: the 28. The next question is whether the prosecution has proved beyond reasonable doubt that the appellants are the real culprits. The value to be attached to a test identification parade depends on facts and circumstances of each case and no hard-and-fast rule can be laid down. The court has to examine the facts of the case to find out whether there was sufficient opportunity for the witnesses to identify the accused. The court has also to rule out the possibility of their having been shown to the witnesses before holding a test identification parade. Where there is an inordinate delay in holding a test identification parade, the court must adopt a cautious approach so as to prevent miscarriage of justice. In cases of inordinate delay, it may be that the witnesses may forget the features of the accused put up for identification in the test identification parade. This, however, is not an absolute rule because it depends upon the facts of each case and the opportunity which the witnesses had to notice the features of the accused and the circumstances in which they had seen the accused committing the offence. Where the witness had only a fleeting glimpse of CRL.A. 1248/2015 + connected matters Page 54 of 94 in holding the in identity, delay to be considered the accused at the time of occurrence, delay in holding a test identification parade has to be viewed seriously. Where, however, the court is satisfied that the witnesses had ample opportunity of seeing the accused at the time of the commission of the offence and there is no chance of mistaken test identification parade may not be held to be fatal. It all depends upon the facts and circumstances of each case.

43. It will thus be seen that the evidence of identification has the peculiar facts and circumstances of each case. Though it is desirable to hold the test identification parade at the earliest-possible opportunity, no hard-and-fast rule can be laid down

in this regard. If the delay is inordinate and there is evidence probalising the possibility of the accused having been shown to the witnesses, the court may not act on the basis of such evidence. Moreover, cases where the conviction is based not solely on the basis of identification in court, but on the basis of other corroborative evidence, such as recovery of looted articles, stand on a different footing and the court has to consider the evidence in its entirety. 67. In Mohd. Sajjad (Supra), the Supreme Court observed that the prosecution witnesses had not given any identification marks/ special features or attributes of the four accused. Further, there was no special circumstance which would have invited attention of the witnesses so as to register or notice special features or attributes of the accused. In the said case the offence was committed at night and the witnesses had only fleeting moments to see the perpetrators. This judgment refers the question of delay in holding of the TIP, its negative facets as highlighted in Subhash Vs. State of U.P. (1987) 3 SCC331 and Musheer Khan Vs. State of M.P.(2010) 2 SCC748 Reference can be CRL.A. 1248/2015 + connected matters Page 55 of 94 also made to another judgment of the Supreme Court Mukesh Vs. State (Govt. of NCT of Delhi) 2017 (6) SCC1 on the question of TIP, wherein it was observed that the law was clear that even if there was no previous TIP the court could appreciate and rely on dock identification. TIP was not a sine qua non in every case, if from circumstances guilt is otherwise established. A detailed discussion on the question of dock identification is also to be found in the case of Prakash Vs. State of Karnataka 2013 (12) SCC133 wherein it has been held that TIP is not mandatory nor can it be claimed as a matter of right. The purpose of TIP is pre trial identification and to assure the investigating agency that they were on right track. It also provides corroboration to the evidence given by the witness or victim in the trial. TIP is undertaken out of caution when the suspect was a complete stranger to the witness or victim. TIP is considered desirable unless the suspect was seen by the witness or victim at some length of time. Failure to hold TIP however, would not make inadmissible the evidence of identification in court, but could affect the weight to be given to such evidence, which is a matter of fact for the courts to decide. In some cases it has been even held that failure of a victim or witness to identify a suspect in the TIP is not fatal if the guilty is otherwise established.

68. Identification of Hemant Garg by the three witnesses, namely, Sunil/PW-1, Varun/PW-6 and Surender/PW-8, therefore, carries weight and is of importance. Noticeably, he is the owner of the Indica car linked with the crime. This is a relevant fact which corroborates his identification and Hemant Garg's involvement as deposed. CRL.A. 1248/2015 + connected matters Page 56 of 94 69. Head Constable Dharmender Kumar, who had deposed as DW- 7, had stated that there was no DD entry regarding recovery and seizure of Indica Car bearing No.DL3AX2192on 9th April, 2009. DW-7 was working as Malkhana Moharrer in Police Station Vikaspuri. Non recording of any DD regarding recovery of any Car should not be a ground to discard or negate the evidence regarding involvement of the aforesaid car on the date of occurrence. It is a fact that the car was subsequently recovered and was produced in the court and was identified by the witnesses.

70. Sonveer was arrested on 27th August, 2009 from Coffee Home Parking, Hanuman Mandir, Connaught Place, New Delhi, on secret information. This fact has been affirmed by Head Constable Vijay Kumar/PW-17, who was assisting Inspector Arun Kumar/PW-48A. The arrest memo and personal search memo were proved as Ex.PW- 17/A and Ex.PW-17/B, respectively. His evidence is affirmed by Head Constable Subhash Chand/PW-40 and Inspector Arun Kumar/PW-48A, who is also referred to as PW-49. In cross- examination of PW-48A/49, it was suggested that Sonveer was picked up from his residence at Vijay Nagar, Ghaziabad, U.P. about 10 days before being formally arrested. Sonveer in his statement under Section 313 of the Code had stated that he was picked one day before being formally arrested on 27th August, 2009. In my opinion the arrest of Sonveer on 27th August, 2009 should be accepted. Presence of Sonveer outside Chintu Car Point has been affirmed by Sunil/PW- 1, Paramjeet Singh/PW-5, Varun/PW-6, Surender/PW-8 and Hemant/PW-10 and Gajender/PW-11. The witnesses Sunil/PW-1, CRL.A. 1248/2015 + connected matters Page 57 of 94 Paramjeet Singh/PW-5, Varun/PW-6 and Surender/PW-8 have also referred to the accused-Sonveer being present in the Indica car and one of the two who had fired from the firearm held by him.

71. As per the prosecution version, Sonveer upon investigation had made two disclosure statements Ex.PW-17/D on 27th August, 2009 and Ex.PW-17/E on 18th September, 2009. The first disclosure statement Ex.PW-17/D did not lead to any recovery. However, the second disclosure statement Ex.PW-17/E had resulted in police finding out and ascertaining that the firearm used had already been taken into possession by the police from police station Mangol Puri upon arrest of one Sanjay @ Sanju S/o Sadhu Ram, resident of S-875, Mangol Puri, Delhi in FIR No.150/2009, Ex.PW-36/A, recorded on 14th May, 2009 on the basis of rukka, Ex.PW-37/C by Sub Inspector Ajay Karan Sharma/PW-37. Seizure memo, Ex.PW37/A would reveal that the weapon recovered from Sanjay on 13th May, 2009 was an automatic pistol with marking "Made in Italy" and four live cartridges, each bearing mark KF766 engraved at the bottom. One of them had an hammer mark. Sonveer had, as per the police, revealed that this weapon was used by him in the crime in question and he had passed on the firearm to Sanjay, who appeared as PW-46. No doubt Sanjay/PW-46 had not supported the prosecution case, but this was natural for admission of recovery of pistol would have implicated him in the charge sheet filed against him for offences under the Arms Act. It is doubtful whether PW-46 could have been asked to depose as a witness without his consent vide Balasaheb Alias Ramsh Laxman CRL.A. 1248/2015 + connected matters Page 58 of 94 Deshmukh versus Satet of Maharashtra and Another, (2011) 1 SCC364 72. The firearm, i.e., the pistol having being recovered on 13th May, 2009 and being in police custody before the disclosure statement of Sonveer Ex.PW-17/E was recorded on 8th September, 2009 would not fall within the purview of Section 27 of the Evidence Act. However, Section 8 of the Evidence Act would be applicable as held in Chandrakant Jha v. State (Govt. of NCT) of Delhi, 2016 SCC OnLine Del 495. This judgment has been extensively quoted by Gita Mittal J., the relevant portion of which reads as under:-

"12. Sarkar on Law of Evidence, 16th Edition, 2007 at page 228, has explained the distinction between Sections 8 and 27 of the Evidence Act by way of an illustration in the following manner; where an accused takes the investigating officer and the panchas to a dealer from where he had purchased the weapon, this evidence would be inadmissible under section 27, but this evidence when corroborated by the dealer, the conduct of the accused in taking the police to the dealer is

admissible under Section 8 of the Evidence Act. We have in our aforesaid narration excluded the entire disclosure statement except the portion which we feel would be admissible under Section 27 or conduct which would be admissible under Section 8 of the Evidence Act. The legal position regarding admissibility with the reference to the two Sections of the Evidence Act has been examined by us in the decision in Criminal Appeal No.216/2015 and Death Reference No.2/2013 arising out of charge sheet filed in FIR No.609/2006 relating to murder of Anil Mandal @ Amit. We would like to reproduce the legal position as summarised by us in the said judgment pronounced today, which reads:-

"44. Section 27 of the Evidence Act has been a subject matter of interpretation in several cases, albeit the CRL.A. 1248/2015 + connected matters Page 59 of 94 judgment of the Privy Council in Pulukuri Kotayya v. King Empror AIR 1947 PC67 is still regarded as locus classicus. The decision holds that a fact discovered is not equivalent of the physical object recovered/produced, and that the fact discovered embraces the place from which the object was produced and the knowledge of the accused as to this fact. Information given by the accused must relate distinctly to that fact. Admissibility would obviously not include in its ambit, a fact already known. In Mohd. Inayatullah v. State of Maharashtra, (1976) 1 SCC828 it was observed:-

"11. Although the interpretation and scope of Section 27 has been the subject of several authoritative pronouncements, its application to concrete cases is not always free from difficulty. It will therefore be worthwhile at the outset, to have a short and swift glance at its requirements. The section says: the section and be reminded of 27. How much of information received from accused may be proved.- Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved. 12. The expression provided that together with the phrase whether it amounts to a confession or not show that the section is in the nature of an exception to the preceding provisions particularly Sections 25 and 26. It is not necessary in this case to consider if this section qualifies, to any extent, Section 24, also. It will be

seen that the first condition necessary for bringing this section into operation is the discovery of a fact, albeit a relevant fact, in consequence of the information received from a person accused of an offence. The second is that the CRL.A. 1248/2015 + connected matters Page 60 of 94 to the fact thereby discovered discovery of such fact must be deposited to. The third is that at the time of the receipt of the information the accused must be in police custody. The last but the most important condition is that only so much of the information as relates distinctly is admissible. The rest of the information has to be excluded. The word distinctly means directly, indubitably, strictly, unmistakably. The word has been advisedly used to limit and define the scope of the provable information. The phrase distinctly relates to the fact thereby discovered is the linchpin of the provision. This phrase refers to that part of the information supplied by the accused which is the direct and immediate cause of the discovery. The reason behind this partial lifting of the ban against confessions and statements made to the police, is that if a fact is actually discovered in consequence of information given by the accused, it affords some guarantee of truth of that part, and that part only, of the information which was the clear, immediate and proximate cause of the discovery. No such guarantee or assurance attaches to the rest of the statement which may be indirectly or remotely related to the fact discovered.

13. At one time it was held that the expression fact discovered in the section is restricted to a physical or material fact which can be perceived by the senses, and that it does not include a mental fact (see *Sukhan v. Crown*; *Rex v. Ganee*). Now it is fairly settled that the expression fact discovered includes not only the physical object produced, but also the place from which it is produced and the knowledge of the accused as to this (see *Palukuri Kotayya v. Emperor*; *Udai Bhan v. State of Uttar Pradesh*). 45. In *Vasanta Sampat Dupare v. State of Maharashtra* (2015) 1 SCC253 the said provision stands exhaustively examined and it was held that recovery of the dead body of the deceased at the instance of the accused would be a fact within the special knowledge of the accused, and therefore, CRL.A. 1248/2015 + connected matters Page 61 of 94 the said recovery including the recovery of the clothes in the said case, were admissible and are relevant evidences as per section 27 of the Evidence Act. The aforesaid decision also refers to Section 8 of the Evidence Act and quotes paragraph 8 from *Prakash*

Chand v. State (Delhi Administration), (1979) 3 SCC90 which reads:-

"8 There is a clear distinction between the conduct of a person against whom an offence is alleged, which is admissible under Section 8 of the Evidence Act, if such conduct is influenced by any fact in issue or relevant fact and the statement made to a Police Officer in the course of an investigation which is hit by Section 162 of the Criminal Procedure Code. What is excluded by Section 162, Criminal Procedure Code is the statement made to a Police Officer in the course of investigation and not the evidence relating to the conduct of an accused person (not amounting to a statement) when confronted or questioned by a Police Officer during the course of an investigation. For example, the evidence of the circumstance, simpliciter, that an accused person led a Police Officer and pointed out the place where stolen articles or weapons which might have been used in the commission of the offence were found hidden, would be admissible as conduct, under Section 8 of the Evidence Act, irrespective of whether accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 of the Evidence Act. statement any by the Paragraph 9 from A.N. Venkatesh v. State of Karnataka (2005) 7 SCC714 was also quoted. The said paragraph reads:-

"9. By virtue of Section 8 of the Evidence Act, the conduct of the accused person is relevant, if such conduct influences or is influenced by any fact in issue or the circumstance, simpliciter, that the accused pointed out fact. The evidence of relevant CRL.A. 1248/2015 + connected matters Page 62 of 94 the statement made by to the police officer, the place where the dead body of the kidnapped boy was found and on their pointing out the body was exhumed, would be admissible as conduct under Section 8 irrespective of the fact whether the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 or not as held by this Court in Prakash Chand v. State (Delhi Admn.). Even if we hold that the disclosure statement made by the accused appellants (Exts. P-15 and P-16) is not admissible under Section 27 of the Evidence Act, still it is relevant under Section 8. The evidence of the investigating officer and PWs 1, 2, 7 and PW4 the spot mahazar witness that the accused had taken them to the spot and pointed out the place where the dead body was buried, is an admissible

piece of evidence under Section 8 as the conduct of the accused. Presence of A-1 and A-2 at a place where ransom demand was to be fulfilled and their action of fleeing on spotting the police party is a relevant circumstance and are admissible under Section 8 of the Evidence Act. 46. In State (NCT of Delhi) v. Navjot Sandhu (2005) 11 SCC600 the two provisions i.e. Section 8 and Section 27 of the Evidence Act were elucidated in detail with reference to the case law on the subject and apropos to Section 8 of the Evidence Act, wherein it was held:-

"205. Before proceeding further, we may advert to Section 8 of the Evidence Act. Section 8 insofar as it is relevant for our purpose makes the conduct of an accused person relevant, is influenced by any fact in issue or relevant fact. It could be either a previous or subsequent conduct. if such conduct influences or There are two Explanations to the section, which explain the ambit of the word conduct. They are: CRL.A. 1248/2015 + connected matters Page 63 of 94 include those statements, unless Explanation 1.-The word conduct in this section does not statements accompany and explain acts other than statements, but this explanation is not to affect the relevancy of statements under any other section of this Act. Explanation 2.- When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant. The conduct, in order to be admissible, must be such that it has close nexus with a fact in issue or relevant fact. Explanation 1 makes it clear that the mere statements as distinguished from acts do not constitute conduct unless those statements accompany and explain acts other than statements. Such statements accompanying the acts are considered to be evidence of res gestae. Two illustrations appended to Section 8 deserve special mention: (f) The question is, whether A robbed B. The facts that, after B was robbed, C said in A's presence - the police are coming to look for the man who robbed B, and that immediately afterwards A ran away, are relevant. * * * (i) A is accused of a crime. The facts that, after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, are relevant. It was further held;- 206. We have already noticed the distinction highlighted in Prakash Chand case between the conduct of an accused which is admissible under Section 8 and the statement made to a police officer in the

course of an investigation which is hit by Section 162 Cr PC. The evidence of the CRL.A. 1248/2015 + connected matters Page 64 of 94 circumstance, simpliciter, that the accused pointed out to the police officer, the place where stolen articles or weapons used in the commission of the offence were hidden, would be admissible as conduct under Section 8 irrespective of the fact whether the statement made by the accused contemporaneously with or antecedent to such conduct, falls within the purview of Section 27, as pointed out in Prakash Chand case. In Om Prakash case this Court held that: (SCC p. 262, para

14) Even apart from the admissibility of the information under Section 27, the evidence of the investigating officer and the panchas that the accused had taken them to PW11 (from whom he purchased the weapon) and pointed him out and as corroborated by PW11 himself would be admissible under Section 8 of the Evidence Act as conduct of the accused. 13. Reference to judgement in Criminal Appeal No.1831/2011 Ranjeet Kumar Ram @ Ranjeet Kumar Das v. State of Bihar decided on 15th May, 2015, would be appropriate. On recovery of a dead body of an unknown boy a FIR was registered at the police station Fakuli. On a missing complaint, a FIR was registered at the police station Vaishali. The accused when arrested in the FIR registered at the police station Vaishali, made a disclosure statement. The leads and clues, led to the police team from the police station Vaishali to the police station Fakuli and thereupon the identity of the dead body found prior to the arrest of the accused was ascertained. Referring to the said facts, the Supreme Court opined: 19. So far as the recovery of dead body of boy under the culvert between Bhagwanpur and Bahadarpur road is concerned, as noticed earlier, a F.I.R. was registered in (Fakuli OP) P.S. Case No.128/2006 dated 22.4.2006 under Sections 302, 201 IPC read with Section 34 IPC. Though the statement recorded from the accused Chintu Singh (A-5) and Birendra Bhagat (A-3) did not lead to any recovery as admissible under Section 27 of the CRL.A. 1248/2015 + connected matters Page 65 of 94 Evidence Act, their statement led to the disclosure of the details of the dead body and registration of F.I.R. in (Fakuli OP) P.S. Case No.128/2006. If no statement was recorded from the accused, place of the dead body of deceased boy would have remained unknown. Equally pertinent are the observations of the Supreme Court in Mehboob Ali v. State of Rajasthan [Criminal Appeal No.808/2010]. decided on 27th October, 2015. The

contention raised by the accused Mehboob or Firoz was that no portion of the disclosure statement was admissible for currency notes were not recovered from them or their possession. In this case one Puranmal was arrested and from his possession fake currency notes were recovered. He had implicated and stated that these currency notes were handed over to him by the accused Mehboob and Firoz, who in turn implicated the third accused Anju Ali. Fake currency notes were recovered from Anju Ali. The said Anju Ali identified yet another co-accused Majhar from whose possession also fake currency notes were recovered. Information supplied by Majhar ultimately led to the arrest of Liyakat Ali from whom again fake currency notes and semi printed currency notes were recovered along with some equipment/instrument. On the question whether the disclosure statement of Majhar and Firoz resulting in arrest of Anju Ali could be relied, it was observed as under: 15. It is apparent that on the basis of the information furnished by accused Mehboob Ali and Firoz other accused, Anju Ali was arrested. The fact that Anju Ali was dealing with forged currency notes was not to the knowledge of the Police. The statement of both accused has led to discovery of fact and arrest of co-accused not known to police. They identified him and ultimately statements have led to unearthing the racket of use of fake currency notes. Thus the information furnished by the aforesaid accused persons vide information memos CRL.A. 1248/2015 + connected matters Page 66 of 94 is clearly admissible which has led to the identification and arrest of accused Anju Ali and as already stated from possession of Anju Ali fake currency notes had been recovered. As per information furnished by accused Mehboob and Firoz vide memos P41 and P42, the fact has been discovered by Police as to the involvement of accused Anju Ali which was not to the knowledge of the Police. Police was not aware of accused Anju Ali as well as the fact that he was dealing with fake currency notes which were recovered from him. Thus the statement of the aforesaid accused Mehboob and Firoz is clearly saved by section 27 of the Evidence Act. The embargo put by section 27 of the Evidence Act was clearly lifted in the instant case. The statement of the accused persons has led to the discovery of fact proving complicity of other accused persons and the entire chain of circumstances clearly makes out that accused acted in conspiracy as found by the trial court as well as the High Court. XXXXX20 Considering the aforesaid dictums, it is apparent that there was

discovery of a fact as per the statement of Mehmood Ali and Mohd. Firoz. Co-accused was nabbed on the basis of identification made by the accused Mehboob and Firoz. He was dealing with fake currency notes came to the knowledge of police through them. Recovery of forged currency notes was also made from Anju Ali. Thus the aforesaid accused had the knowledge about co-accused Anju Ali who was nabbed at their instance and on the basis of their identification. These facts were not to the knowledge of the Police hence the statements of the accused persons leading to discovery of fact are clearly admissible as per the provisions contained in section 27 of the Evidence Act which carves out an exception to the general provisions about inadmissibility of confession made under police custody contained in sections 25 and 26 of the Evidence Act. C.R.L.A. 1248/2015 + connected matters Page 67 of 94 Act. We would prefer to rely on the said lucid ratio as equally and affirmatively applicable to Section 8 of the Evidence Act. 73. On the question of recovery of pistol from Sanjay @ Khatta /PW-46, I would refer to the testimonies of Head Constable Moti Ram /PW-33, Head Constable Sukh Ram /PW-36 and SI Ajay Karan Sharma /PW-37, Head Constable Subhash Chand /PW-40, Head Constable Rajender Singh /PW-41 and Metropolitan Magistrate Mr. Vishal Singh/ PW-45. FIR No.150/2009 Police Station Mangolpuri was registered on 14th May, 2009 against Sanjay /PW-46. The said FIR was under Section 25 of the Arms Act as a pistol and some rounds were seized and deposited in Malkhana. On these facts / assertion there is hardly any in the cross-examination, which would dent the prosecution version and testimonies. Statement of SI Ajay Karan Sharma /PW-37, who along with others had arrested Sanjay /PW-46, remains virtually unchallenged. Ajay Karan Sharma / PW-37 had also drawn sketch of the recovered pistol and cartridges which was marked as PW-37/A and the articles seized were sealed with the seal of A.K.S. and taken into possession vide seizure memo PW-37/B. Ajay Karan Sharma / PW-37 was not cross examined by counsel for the Sonveer and other appellants. The said parcel as per the testimony of Head Constable Moti Ram/PW-33 was sent to the FSL Rohini on 26th June, 2009 and result / opinion was received on 10th September, 2009 along with the sealed parcel. Subsequently on 14th September, 2009 this parcel with the seal of FSL was transferred to police station Chanakyapuri. C.R.L.A. 1248/2015 + connected matters Page 68 of 94 74. Mr. Vishal Singh, Metropolitan Magistrate

/PW-45 has stated that on 14th September, 2002 (sic. 2009), Mohrar Malkhana, Police Station Mangolpuri had appeared along with the sealed property under Section 25 of the Arms Act relating to FIR No.150/2009. Inspector Arun Kumar / PW-48A/PW-49 had appeared and testified that the said case property was involved in the present case and was required to be examined in ballistic laboratory of FSL at Rohini. The sealed parcel, which had the seal of FSL Rohini from earlier examination, was opened and found to contain one pistol, three live cartridges and one empty cartridge. The pistol was handed over to Inspector Arun Kumar / PW-48A and the sealed pullanda containing cartridges were returned back to Moharrar Malkhana, Police Station Mangolpuri. PW-45 was not cross-examined. I have also read the evidence of Inspector Arun Kumar / PW-48A/PW-49, who has affirmed the said position. The said witness was not cross-examined, on the question of pistol which was identified by him and had been marked as Ex.PW-37A. The said pistol had been produced in a sealed parcel with the seal of FSL report No.2009 F4309.

75. Head Constable Rajender Singh /PW-41 had stated that Inspector Arun Kumar / PW-48A on 14th September, 2009 had deposited one parcel with the seal of BS stated to be containing the pistol and entry to that effect was made in the register. On 29thMay, 2009 the said parcel was sent to FSL, Rohini through Head Constable Satish Kumar. Subsequently on 15thOctober, 2009, one parcel and five live cartridges were sent to FSL Rohini through ASI Narender Singh, CRL.A. 1248/2015 + connected matters Page 69 of 94 Special Staff. On 24thDecember, 2010, results from the FSL laboratory were received.

76. As noticed above, FSL report was taken on record in the High Court by permitting the prosecution to lead additional evidence. The FSL Report,Ex HC -A, affirms that the weapon was an improvised pistol of 7.65 mm bore and was in working order. The opinion Ex.HC-B states that the pistol was used to fire two empty or fired cartridges recovered from the site/scene of crime. The reports Ex.HCA and Ex.HCB thus affirm that the fire arm seized from Sanjay /PW-46 was used in the occurrence. The details of the said fire arm and the fact that the fire arm was with Sanjay/ PW-46 came to the knowledge of the police only after Sonveer was arrested. Though the pistol was recovered by S.I. Ajay Karan

Sharma /PW-37 of Police Station Mangolpuri on 13th May, 2009 there is not even an iota of evidence to suggest that PW-37 or PW-48A, had suspected that the said weapon was used for murder in the present case. The said factum came to the knowledge of the police on interrogation of the appellant, Sonveer. As the weapon had already been recovered by the police before the disclosure statement Ex.PW-17/A was recorded, therefore, Section 27 of the Evidence would not be attracted to make that part of the said disclosure statement as admissible, albeit section 8 of the Evidence Act would be attracted to the limited extent that the arrest and interrogation of Sonveer had led to information with regard to seizure of pistol used in the said offence from Sanjay/PW-46, a fact affirmed by the FSL report and the statements of SI Ajay Karan Sharma /PW-37 and other witnesses. As noticed above, SI Ajay CRL.A. 1248/2015 + connected matters Page 70 of 94 Karan Sharma /PW-37 was never questioned on these aspects relating to recovery of the pistol or that Sanjay /PW-46 had indicated or even hinted that the pistol was recovered from him was involved in the present occurrence. No such suggestion was given on behalf of Sonveer to Inspector Arun Kumar / PW-48A.

77. On the basis of the aforesaid evidence I have come to the conclusion that the pistol recovered from Sanjay /PW-46 was used for the offence in question. Further police had come to know about the use of the said pistol and its recovery from Sanjay /PW-46 in FIR No.150/2009 police Station Mangolpuri on interrogation and revelations made by Sonveer. This corroborates the eye witnesses versions identifying Sonveer as one of the persons, who had fired from the Indica Car. Presence of Sonveer at the spot has also been confirmed by Hemant /PW-10 and Gajender Singh /PW-11 who were present at Chintu Car Point on 22ndFebruary, 2009.

78. The contention raised on behalf of Sonveer regarding discrepancies etc. and that the cartridges recovered with the firearm and produced before the Court were deposited in the Malkhan, Police Station-Mangol Puri and, therefore, the FSL reports Ex.HC-A and Ex.HC-B should be disregarded has been rightly rejected by R.K. Gauba, J.

The FSL reports were taken on record during the pendency of the appeal in the High Court and thereafter, additional statements of the appellants under Section 313 of the Code were recorded. Gita Mittal J.

in paragraph 644 of her judgment has accepted that the ballistic evidence in the present case supports the prosecution case on firing at the black Santro car in which Ankit had received gunshot CRL.A. 1248/2015 + connected matters Page 71 of 94 injury. She has observed that the evidence points towards possibility of the weapon recovered in FIR No.150/2009 as having been used in the crime.

79. Thus, two of the spent cartridges found at the scene of crime have been positively connected with weapon i.e. fire arm used and was seized from Sanjay / PW-46. Pertinently, Sonveer had refused to participate in the TIP proceedings as recorded in Ex.PW-49/F dated 4th September, 2009. Sonveer had taken a plea that he had been shown to the witnesses at the police station without specifying the time or the date he was shown to the witnesses.

80. Vishnu was involved in a criminal case being FIR No.47/2007 under Sections 324, 506 and 34 IPC, Police Station-Prashad Nagar, in which proceedings he was absconding. Vishnu surrendered in the said case and was taken into custody on 26th September, 2009 and subsequently information was passed on to Inspector Arun Kumar/PW-48A, who then moved application Ex.PW-49/K before the Metropolitan Magistrate. Vishnu was produced before the Metropolitan Magistrate on 29th September, 2009 and was formally arrested in the said case. On the same date, application Ex.PW-49/N was moved for conducting his TIP. The application records Vishnu being produced in a muffled face. The application was allowed vide order dated 29th September, 2009, which order mentioned that Vishnu was in muffled face. TIP was fixed on 5th October, 2009 on which date Vishnu refused to participate as per proceeding Ex.PW-49/P. Subsequently, on 8th October, 2009, Vishnu was sent to police custody. Vishnu however relies statement of his wife Pooja/DW-3, CRL.A. 1248/2015 + connected matters Page 72 of 94 who had deposed that a police officer from PS Chankya Puri including Inspector Arun Kumar/PW-48A had come and searched their house on 17th September, 2009 at 2:00 p.m. They had made inquiries about Vishnu and asked for his photographs.

They had taken a photo album which contained photographs of her husband. She had sent a telegram in this regard to Commissioner of Police and other authorities marked Ex.DW3/A. Inspector Arun Kumar/PW-48A accepts receipt of this telegram but had denied the assertions and contents. Regarding the contention of Appellant-Vishnu, that he had refused to take part in the TIP proceedings as he had already been shown to the witnesses, Sunil/PW-1 has stated in his cross examination that when the accused Vishnu was arrested, he had gone to the Police Station where he was being interrogated and had identified him. The date is not indicated. It would necessarily be when Vishnu was in police custody. No suggestion predicated on photographs was given and confronted to PW-1. Varun/PW-6 has stated in his cross examination that he had been summoned to the court on three dates, of which he attended two, but categorically denied the suggestion that on those days he had been made to know and identify the accused persons. Surender/PW-8 stated that he had not joined any investigation of the police but had gone back to his native village for 4-5 months after the incident. He also stated that he had attended court hearings multiple times, but no suggestion or question regarding Vishnu's photo being shown to him was put to him during his cross examination. Similarly, Paramjeet Singh/PW-5 has also not been questioned on whether the police showed him any photographs of the accused Vishnu before conducting CRL.A. 1248/2015 + connected matters Page 73 of 94 TIP proceedings. We cannot place much reliance on the aforesaid testimony including the telegram, Ex.DW-3/A dated 17th September, 2009. Vishnu's name was mentioned in the charge-sheet filed on 23rd May, 2009. The prosecution assertion that this telegram was issued in view of the legal advice to create evidence, does carry weight.

81. Thus, on the question of identification of accused-Vishnu, we have the statements of Sunil/PW-1, Paramjeet Singh/PW-5, Varun/PW-6 and Surender/PW-8, who were present outside Chintu Car Point and in the Santro car when the firing took place. Similarly, Hemant/PW-10 and Gajender/PW-11 have identified Vishnu as one of the persons present outside Chintu Car Point.

82. Non-recovery of weapon in the context of the present case cannot be a good ground to acquit Vishnu. In *Lakhan Sahu Vs. State of Bihar* 2000 (9) SCC82 State

of Rajasthan Vs. Arjun 2013 (12) SCC812 the Supreme Court has impressed that mere non-recovery of a pistol or cartridge does not in any case detract the case of the prosecution where there is clinching and direct evidence.

83. Counsel for Vishnu, Sonveer and Hemant Garg had laid considerable emphasis on the fact that the firing had taken place from a moving car being driven at a fast speed and that the Santro car had tinted glass and hence, the witnesses present in the Santro car could not have identified the perpetrator who had fired or Hemant Garg, who was statedly driving the Indica car. This was a case of targeted attack deliberately intended to harm those, who were present outside Chintu Car Point and had driven away in the Santro car. It is not a case wherein firing had taken place on account of sudden quarrel or fight at CRL.A. 1248/2015 + connected matters Page 74 of 94 the place of firing. The eye witnesses, immediately before, had the occasion to see and notice Vishnu, Sonveer, and Hemant Garg at Chintu Car Point, and thereafter there was a brawl lasting for some minutes. Firing incident was shortly thereafter. The way and manner in which the Indica car was driven and had followed the Santro car would be a compelling factor indicating and showing that there was a past grievance and cause, which would be the motive to commit the crime. The persons present in the Santro car were targeted. The Santro car with the occupants known to the perpetrators was pursued and then attacked. Pretext of black tinted glasses and rolled/closed windows of the Santro Car or head rest inside Indica Car would not in my mind be a factor in favour of the defence. These are assumptions. The question whether or not the identification of the perpetrators by the eye witnesses whose presence at the place of crime is accepted, is substantially a question of fact. There are cases in which such versions have been accepted and also cases when identification has been disbelieved. I would, therefore, not refer to several decisions cited by the defence or even the prosecution for there cannot be said to be a straitjacket binding ratio, for a decision on fact or facts specific does not lay down a dictum. For example in Pargan Singh Vs. State of Punjab & Anr. (2014) 14 SCC619 the Supreme Court came to the conclusion that in the given facts and in view of the nature of the incident, 90 seconds was a long enough period to enable the one eye witness to watch the accused and identify him, even after seven and a half years. This was a case of the death of a friend and the court held that the said

horrific experience would have remained etched in the CRL.A. 1248/2015 + connected matters Page 75 of 94 memory. It would, therefore, not be possible to ignore and brush off the statements made by the said witnesses identifying Hemant Garg, Sonveer and Vishnu, on the argument of fleeting glimpse. On the other hand, their identification carries weight and deserves affirmation as correct. In the case of Sonveer, the forensic report affirms his involvement as the pistol recovered from Sanjay/PW-46 pursuant to interrogation of Sonveer was found to be involved in the firing which had caused death of Ankit. The FSL reports HC-A to HC-C would therefore corroborate involvement of Sonveer and indirectly of Vishnu, as the second weapon of offence could not be recovered, though the fact that two fire arms were used, as stated by the eye witnesses Sunil -PW-1, Paramjeet Singh /PW-5, Varun/ PW-6 and Surrender / PW-8, is corroborated and confirmed from the fact that the third fired cartridge, as per the ballistic FSL report Ex. HC-B, was not fired from the fire arm examined. The third empty cartridge was fired from another fire arm.

84. Identification of Hemant Garg as the driver of the Indica car gets affirmed and confirmed by the fact that the said car was owned by him and he has unable to show and establish his alibi that the car was not in his possession on the date of the occurrence. The dock identification of Hemant Garg made by Sunil/PW-1, Surrender/PW-8 and Varun/PW-6 affirms his presence, even if for the sake of argument, we ignore the dock identification by Paramjeet Singh/PW- 5, who had failed to identify Hemant Garg in the TIP. CRL.A. 1248/2015 + connected matters Page 76 of 94 85. No doubt the prosecution has not examined the water vendor, but this would not make any difference and water down the evidence of the eye witnesses and other corroborative material on record. Sushil Arora and Rajesh Pandey 86. This brings me to the evidence and the case against the appellants Sushil Arora and Rajesh Pandey. I would first note the facts or factums against both of them. Facts against them are;- (i) Sushil Arora and Rajesh Pandey were named by Sunil /PW-1 in his first statement Ex.PW-1/A, which got recorded as the FIR marked Ex. PW-25/A. Their names therefore, came on the police record at the initial or at the very first stage. This would negate false implication. (ii) Immediately before firing at T-point, Simon Bolivar Marg, Mahindra Singh/PW-9 with Hemant/PW-10 and Gajender/PW-11 had visited the office of Sushil Arora at

Chintu Car Point. Rajesh Pandey was present in the office. The discussions were on the question of re-payment of the loan of Rs.10.0 lacs given by PW-9. Rajesh Pandey had participated in the said discussion which was acrimonious though there was a settlement. This as per the prosecution version was the motive for the firing which led to death of Ankit Manocha and injuries on Surender /PW-8. (iii) The firing by the occupants of the Indica Car was a deliberate, intentional, and coagulated act reflective of past rancour. It was an act to seek revenge and was vengeful. This CRL.A. 1248/2015 + connected matters Page 77 of 94 as per the prosecution connects the crime with the motive and links the two appellants. (iv) There is evidence to show that Rajesh Pandey was coming in and out of Chintu Car Point and talking to the boys i.e Hemant Garg, Vishnu, and Sonveer, outside. This indicates that the boys outside had been called and were acting at the behest of Sushil Arora and Rajesh Pandey. (v) PW-1 / Sunil and Paramjit /PW-5 have identified Sushil Arora and Rajesh Pandey as two of the occupants, who were sitting on the rear seat of the Indica car. They were present in the car, though they had not fired. (vi) Varun /PW-6 did not initially recognize and identify Rajesh Pandey as one of the occupants of the Indica car, but on the cross-examination by the public prosecutor had identified Rajesh Pandey. (vii) Rajesh Pandey had refused to join TIP.

87. On the other hand Sushil Arora and Rajesh Pandey have highlighted the following facts which they say would reflect and negate their involvement:-

"(i) The prosecution accepts that there was another occurrence outside Chintu Car Point involving persons, as a motorcycle had obstructed the Santro Car. The deceased along with witness Varun/PW-6, as per Sunil/PW-1, Paramjeet /PW- 5, Varun /PW-6 and Surender /PW-8 had grappled with these CRL.A. 1248/2015 + connected matters Page 78 of 94 boys. Mahindra Singh/PW-9, Hemant/PW-10, and Gajender/PW-11 also affirm the said brawl. This fight was serious as Pushkar Raj /DW-6 had made a phone call to the police. The said factum was affirmed and accepted by the first investigating officer, Inspector S.S. Rana /PW-26 and vide PCR records. (ii) As per the prosecution witnesses Mahindra Singh /PW-9, Hemant/PW-10 and Gajender/PW-11 the dispute with regard to the re-payment of loan of Rs.10.0 lacs

was amicably resolved. The controversy had settled with the appellant Sushil Arora agreeing to make repayment of loan in instalments, which was accepted after some resistance. No violence took place at Chintu Car Point nor was any injury caused or suffered by Mahindra Singh /PW-9. Mahindra Singh /PW-9 had left Chintu Car Point in Esteem Car along with Hemant/PW-10 and Gajender/PW-11. The Indica Car with the perpetrators had not followed Mahindra Singh /PW-9 but had followed Santro Car which was being driven by Paramjeet Singh /PW-5. This indicates that the perpetrators were aggrieved and the motive was the second occurrence outside Chintu Car Point where there was a fight on account of motor cycle obstructing the Santro Car. (iii) Sushil Arora was arrested on 24th February, 2009. Sushil Arora did not disclose or divulge the names and details of other three appellants, namely Hemant Garg, Vishnu and Sonveer. Name of Hemant Garg came to the knowledge of the police CRL.A. 1248/2015 + connected matters Page 79 of 94 after they had checked the registration records of the Car in question. Name and details of Vishnu and Sonveer were ascertained much later and cannot be attributed to Sushil Arora. (iv) If Sushil Arora was sitting in the Indica Car, he would have certainly given the details and names of Vishnu and Sonveer, after all they have travelled in the same car and had occasion to interact. (v) Police investigation has not revealed and it is not asserted that Sushil Arora and Rajesh Pandey were interacting and had prior acquaintance with Hemant Garg, Vishnu and Sonveer i.e. prior to the date of occurrence. Call record details of Rajesh Pandey, Sushil Arora and appellants Hemant Garg, Vishnu and Sonveer have not been placed on record and relied. Investigation is deliberately quite on the said aspect for there is no evidence to link and connect Sushil Arora and Rajesh Pandey, with Hemant Garg, Sonveer, and Vishnu. (vi) The assertion of the witnesses, namely, Sunil /PW-1, Paramjeet PW-5, Varun /PW-6, Surender /PW-8, Hemant Garg /PW-10 and Gajender Singh /PW-11 that Rajesh Pandey was coming in and out at Chintu Car Point and speaking to the boys outside is concocted and a false assertion. There was no reason and cause for Rajesh Pandey to indulge and interact with the unknown boys. Version given by Sunil/PW-1 in rukka Ex. PW- 1/A was different. (vii) It would be specious and imprudent to accept testimonies of Sunil/PW-1 and Paramjeet Singh/PW-5 (also Varun/PW-6 in CRL.A. 1248/2015 + connected matters Page 80 of 94 the case of Rajesh

Pandey) that Sushil Arora and Rajesh Pandey were present in the Indica Car with the perpetrators when firing took place at Ridge Road, near Simon Boliver T-Point. These witnesses have falsely and wrongly implicated them, even when Sushil Arora and Rajesh Pandey were not present in the Indica Car for they verily believed and had suspected their involvement. The witnesses have gone by intuition and instinct in naming Sushil Arora and Rajesh Pandey given the fact that the firing took place immediately after they had left Chintu Car Point. These eye-witnesses have not spoken the truth and had named Sushil Arora and Rajesh Pandey because they perceived and honestly believed their involvement and thus have falsely deposed on their presence in the Indica car. The identification of Sushil Arora and Rajesh Pandey is tainted and should not be accepted. (viii) Pushkar Raj /DW-6, brother of Sushil Arora had made a call to the Police after brawl outside Chintu Car Point. If and in case Sushil Arora and Rajesh Pandey wanted to kill Mahindra Singh /PW-9 or his team, Pushkar Raj /DW-6 would not have made the said call and made complaint to the police.

88. I have given my due consideration to the rival contentions and the relevant material both in favour and against the Sushil Arora and Rajesh Pandey. Certainly, if the identification by Sunil /PW-1 and Paramjeet /PW-5, is to be accepted then both Sushil Arora and Rajesh Pandey were present in the Indica Car. Varun/PW-6 did not initially CRL.A. 1248/2015 + connected matters Page 81 of 94 identify Rajesh Pandey but subsequently on being declared hostile had accepted that Rajesh Pandey was present in the Indica Car. However, he did not identify Sushil Arora. Surender /PW-8 did not identify both Rajesh Pandey and Sushil Arora. However, PW-8 did perceive that some other persons were present in the Indica Car.

89. It is possible to urge with persuasion that the identification by Sunil /PW-1 and Paramjeet /PW-5 would be accepted for other witnesses may not have possibly identified and seen the other persons present in the Indica Car. Surender PW-8 may not have had the occasion to have a good look to identify others. The same argument would be applicable as far as non-identification of Sushil Arora by Varun/ PW-6.

90. Decision in the case of Pargan Singh (Supra) refers to the decision of the United States Court of Appeal in Javier Suarez Medina Vs. Janie Cockrell, which discussed the scientific evidence as to how memory works, and observed as under: 18.2. Memory researchers study how memory works using a variety of techniques. A common technique is to try to identify circumstances under which memory is inaccurate versus circumstances under which memory is accurate. These efforts have revealed four major sets of circumstances under which memory tends to be inaccurate. The first two sets of circumstances involve what is happening at the time the to-be-remembered event is originally experienced, while the second two sets of circumstances involve things that happen after the event has ended. CRL.A. 1248/2015 + connected matters Page 82 of 94 18.3. The first set of circumstances involves the state of the environment at the time the event is experienced. Examples of poor environmental conditions include poor lighting, obscured or interrupted vision, and long viewing distance. To the degree that environmental conditions are poor, there is relatively poor information on which to base an initial perception and the memory that it engenders to begin with. This will ultimately result in a memory that is at best incomplete and, as will be described in more detail below, is at worst systematically distorted. 18.4. The second set of circumstances involves the state of the observer at the time the event is experienced. Examples of sub-optimal observer states include high stress, perceived or directly inflicted violence, viewing members of different races, and diverted attention. As with poor environmental factors, this will ultimately result in a memory that is at best incomplete and, as will be described in more detail below, is at worst systematically distorted. 18.5. The third set of circumstances involves what occurs during the retention interval that intervenes between the to-be-remembered event and the time the person tries to remember aspects of the event. Examples of memory-distorting problems include a lengthy retention interval, which leads to forgetting, and inaccurate information learned by the person during the retention interval that can get incorporated into the person's memory for the original event. 18.6. The fourth set of circumstances involves errors introduced at the time of retrieval i.e. at the time the person is trying to remember what he or she experienced. Such problems include biased tests and leading questions. They can lead to a biased report of the person's memory and

can also potentially change and bias the memory itself. CRL.A. 1248/2015 + connected matters Page 83 of 94 (See: 'The fallibility of memory in judicial processes: Lessons from the past and their modern consequences' by Mark L. Howe and Lauren M. Knott, Memory 2015 Vol 23, No.5 633-656 and 'Interviewing Witnesses: The Effect of Forced Confabulation on Event Memory', by Kathy Pezdek, Kathryn Sperry, and Shana M. Owens, Law Hum Behav (2007) 31:

463. 478.) 91. Issue of identification of Sushil Arora and Rajesh Pandey in the present case is even more complex for the assertion is that the witnesses Sunil /PW-1, Paramjeet Singh/ PW-5 and Varun /PW-6 have not deposed on the basis of their memory, but the two have been implicated then even when they were not present in the Indica Car because the witnesses perceived and verily believed that they were behind the perpetrators and were responsible for the firing. It is this belief which has impelled and motivated the said witnesses to implicate Sushil Arora and Rajesh Pandey. I have to be cautious and examine whether there was confabulation. In Shankarlal Gyarasilal Dixit v. State of Maharashtra, AIR 1981 SC765 while dealing with the question of accusation by eye witnesses, the Supreme Court had observed:-

"Our judgment will raise a legitimate query: If the appellant was not present in his house at the material time, why then did so many people conspire to involve him falsely?. The answer to such questions is not always easy to give in criminal cases. Different motives operate on the minds of different persons in the making of unfounded CRL.A. 1248/2015 + connected matters Page 84 of 94 accusations. Besides, human nature is too willing, when faced with brutal crimes, to spin stories out of strong suspicions. In the instant case, the dead body of a tender girl, raped and throttled, was found in the appellant's house and, instinctively, everyone drew the inference that the appellant must have committed the crime. No one would pause to consider why the appellant would throw the dead body in his own house, why would he continue to sleep a few feet away from it and whether his house was not easily accessible to all and sundry, as shown by the resourceful Shrinarayan Sharma. No one would even care to consider why the appellant's name was not mentioned to the police until quite late. These are questions for the Court to consider. (emphasis supplied) Aforesaid observations have to be read with caution

and care and not applied indiscriminately on mere suppositions. Attending and asymmetrical facts emerging on record are required to be examined when they conflict with implicative testimony of the eye-witness to rule out any attempt to connect and link an accused with the crime on the basis of strong suspicion. Ocular testimony normally merits confirmation, unless there are good grounds and reasons to discard and reject orate, as ordained on mere perception and too pernicious for the court to rely and accept.

92. It is correct that when there is direct imperative and impelling evidence, question of motive can pale into insignificance as has been held in *Bipin Kumar Mondal Vs. State of West Bengal* (2010) 12 SCC91 albeit in the present case, prosecution relies upon motive as CRL.A. 1248/2015 + connected matters Page 85 of 94 an incriminating circumstance and material. Importantly, as per the prosecution version firing which had caused death of Ankit was in retaliation and an act of revenge. In these circumstances, motive does acquire significance and importance when we examine the question as to who were the perpetrators. In the aforesaid background, it would not be correct to ignore the occurrence outside Chintu Car Point which had resulted in a brawl, and hold that the said factum, though approved, would establish only motive and thus should be treated as inconsequential by squarely relying on eye witnesses. In the cases of direct evidence, which is credible and acceptable, failure of the prosecution to establish motive is not material, but in the facts of the present case, when veracity and credibility of the direct evidence itself is in question, motive when elucidated and relied, has to be factored and given adequate consideration.

93. There is evidence of witnesses including Mahindra Singh /PW- 9 and Gajender Singh /PW-11 that Rajesh Pandey was going in and out to meet the persons outside. Complaint Ex.PW1/A by Sunil states that boys were moving in and out of the office and not that Rajesh Pandey was repeatedly moving out to talk to them. However, even if this is accepted as correct that these witnesses have not testified on the direct involvement of Sushil Arora or Rajesh Pandey when there was a brawl and a fight outside Chintu Car Point when the Santro Car could not be moved.

94. Varun/PW-6 in his statement under Section 161 marked Ex. PW-6/6A had stated that there was a fight outside Chintu Car Point and the same boys were present in the Indica car when the firing took CRL.A. 1248/2015 + connected matters Page 86 of 94 place at the Ridge Road near Simon Bolivar T-Point. This statement specifically refers to both Sushil Arora and Rajesh Pandey by name but does not state that both of them were present in the Indica car. However, Varun/PW-6 did blame both Sushil Arora and Rajesh Pandey for the firing.

95. Inspector S.S. Rana/PW-26 in his application dated 24th February, 2009, seeking 7 days' remand of appellant-Sushil Arora had stated that on 22nd February, 2009, there was exchange of words followed by scuffle with brick bats between the two groups and the party headed by Mahendra Singh/PW-9 had overpowered the other party and had beaten them black and blue. Thereafter, Mahendra Singh/PW-9 had left in his car. Rajesh Pandey, Sushil Arora and three others had followed the first party with a loaded pistol and had overtaken the Santro car. This application specifically mentions that three unknown persons involved in the said occurrence were yet to be arrested and pistol was also to be recovered. The prosecution version as per the charge sheet was strikingly different. Ocular evidence led and relied upon by the prosecution does not refer to any altercation and fight with direct involvement of Mahendra Singh/PW-9, or Sushil Arora and Rajesh Pandey.

96. On behalf of Sushil Arora it was submitted that he was using mobile No.9811071400 and the police has deliberately withheld the call record details including location which would indicate that he was not present in the Indica Car. Reliance is placed upon testimony of Pushkar Raj /DW-6, who had deposed to the effect that the appellant CRL.A. 1248/2015 + connected matters Page 87 of 94 Sushil Arora was carrying mobile No.9811071400, which used to always remain with him. He had testified that Sushil Arora had left Chintu Car Point at 2:30 p.m. in the Santro Car DL8N5173 for miscellaneous work and had visited the car dealers in and around Karol Bagh area and then to his fathers house at Rohini. The fact that Sushil Arora had remained at the shop till 2:30 p.m. on 22nd February, 2009 was verified and confirmed to the police by the neighbourhood shopkeepers. However, these shopkeepers were not enlisted as witnesses and

did not depose. Pertinently, neither did the defence seek their presence and appearance as witness in support of their alibi. DW-6 had remained at the shop and at about 7:45 p.m. he had spoken police officers who had visited Chintu Car Point in a Gypsy car and made enquiries from him regarding the earlier brawl and Sushil Arora. They had left after noting the name, address and phone number of Sushil Arora. On 23rd February, 2009 at about 1:30 p.m. he had received a call from police station Chanakya Puri, who had enquired about Sushil Arora. He was asked him to come to the police station with Sushil Arora. He and Sushil Arora thereafter had visited the police station Chanakya Puri where enquiries were made from them and were let off and told that they would be called again. On 24th February, 2009, he had received another call from Police Station Chanakya Puri. He and Sushil Arora, as per the directions, visited the said police station where Sushil Arora was arrested.

97. Sushil Arora had also summoned Israr Babu, Alternate Nodal officer Vodafone, who had deposed as DW-5 and had proved call record details of mobile No.9811071400 for the month of February, CRL.A. 1248/2015 + connected matters Page 88 of 94 2009. The tower location charts were marked as Ex.DW-5/A and DW-5/C respectively. He testified that mobile No.9811071400 was issued in the name of Sushil Arora and proved the screen shot of the details as Ex.DW-5/D. The location chart indications from 1:30 to 2:30 p.m. on 22nd February, 2009 was marked X-1 to X-16; and the certificate given under Section 65B of the Evidence Act bearing signatures of DW-5 was marked as Ex.DW-5/B.

98. Pushkar Raj /DW-6, however, in his cross-examination had stated that there were five mobile phones in his family as on 22nd February, 2009 and he did not remember these mobile phone numbers, except 9213904572. He was cross-examined but denied the suggestion that Sushil Arora was not carrying with him mobile No.9811071400 on 22nd February, 2009.

99. The prosecution does not rely upon the call record details and location chart as evidence which would implicate Sushil Arora. The call record details of mobile No.9811071400 and the location chart would to some extent support the case of Sushil Arora, but I cannot with certainty hold that it is proved and established

beyond doubt and debate that mobile No.9811071400 was with Sushil Arora at the time of occurrence, in spite of the testimony of Pushkar Raj /DW-6. The said witness has accepted that there were as many as five mobile phones in his family, details of which (except one number) were not forthcoming. The call record details of all these numbers and location chart was not available. I would, in these circumstances, not hold that the call record details and location chart of mobile No.9811071400 CRL.A. 1248/2015 + connected matters Page 89 of 94 would absolve and contra-indicate presence of Sushil Arora in the Indica Car at the time of firing. The alibi, which is solely based upon testimony of Pushkar Raj /DW-6 and Israr Babu/ DW-5 is not fully and affirmatively established beyond doubt.

100. In Tomaso Bruno Vs. State of U.P. (2015) 7 SCC178 it has been observed that the best evidence that could have thrown a better light on the facts and circumstances and which was available, but was not collected and consequently withheld by the prosecution, was a factor which could be taken into account by the court by applying presumption under Section 114 (g) of the Evidence Act. This position/ratio would apply when the evidence produced is shaky and debatable. Evidence adduced both oral and documentary must be first examined to ascertain its veracity and whether it proves the case beyond reasonable doubt. Multiplicity and duplication of evidence is not required. However, assertion of the prosecution in the present case in the context of Sushil Arora and Rajesh Pandey is debatable and therefore failure or withholding a relevant consideration. In this context failure to adduce relevant evidence and lapses in investigation assume relevance and importance.

101. I would accept that the prosecution/investigation was not able to ascertain from Sushil Arora upon arrest on 24th February, 2009, names of both Sonveer and Vishnu as occupants in the Indica car. Police had been able to ascertain the name of Hemant Garg by 23rd February, 2009 being the registered owner of the Indica car. This is apparent from the case dairy wherein name of Vishnu finds mentioned CRL.A. 1248/2015 + connected matters Page 90 of 94 for the first time on 25th February, 2009 and the name of Sonveer was recorded for the first time in May, 2009. This apart, Inspector Jagat Singh/PW-47, who was the SHO and was involved in investigation with Inspector S.S. Rana/PW-26, has accepted that he

had interrogated Sushil Arora along with PW-26. Sushil Arora, as per PW-47 had specifically named Rajesh Pandey i.e. only Rajesh Pandey and no other accused including Hemant Garg. PW-46 subsequently accepted that he had come to know the other three accused i.e. Hemant Garg, Vishnu and Sonveer by 27th February, 2009, but was unable to remember on what basis i.e. document and fact. This assertion finds corroboration from the remand application dated 24th February, 2009 moved for police remand of Sushil Arora, which records that "another four assailants, namely, Rajesh Pandey and three unknown are to be arrested". Similarly, on 20th March, 2009, investigation had sought issuance of non-bailable warrants only against Rajesh Pandey and Hemant Garg and no one else. Written reply by the investigation opposing application for anticipatory bail by Hemant Garg filed in April, 2009, did not name Vishnu and Sonveer. It is in this factual context that it is submitted with merit that Sushil Arora did not know and had not named Hemant Garg, Vishnu and Sonveer. Inference being that he was not with them in the Indica car.

102. The second assertion which again has substance stems from the deposition of Pushkar Raj/DW-6, who had made a telephone call to police control room at 1.45 P.M. about a fight (jhagra) at 17, Pusa Road, City Hospital, which was recorded as DD No.20A, Ex.PW-27/A by Head Constable Arvind Kumar/PW-27, Police Station Karol Bagh. CRL.A. 1248/2015 + connected matters Page 91 of 94 Similarly, Head Constable Mahadev Prashad/PW-28 had recorded DD No.23B, Ex.PW-23/A at police station Rajendra Nagar. DD No.20A was marked to ASI Deshpal and DD No.23A was marked to ASI Ramphool for further action. The prosecution did not produce either ASI Deshpal, police station Karol Bagh and ASI Ramphool, police station Rajendra Nagar. Their evidence would have been relevant as they would have visited Chintu Car Point and could elucidated on presence or absence of Sushil Arora and Rajesh Pandey at Chintu Car Point. The action taken and the report received with regard to DD No.20A Ex.PW-27/A or DD No.23B, Ex.PW-23/A has not been adduced and produced. The visit and the two officers was certainly of consequence because it would have coincided with the shooting incident. Moreover, the police complaint by Pushkar Raj/DW-6 would also reflect that at that time, he or his brother Sushil Arora and Rajesh Pandey did not intend to resort to violence and had no intention to cause death for otherwise DW-

6 would not have made the said call.

103. I have already dealt with the arguments relating to the call details records of Sushil Arora and pointed the flaws in the arguments of defence in that regard. Nevertheless, it is recorded that the prosecution has failed and not adduced evidence to show and establish inter-action and connection between Sushil Arora and Rajesh Pandey and Vishnu, Sonveer, and Hemant Garg before and after the occurrence and also adduced any evidence so as to establish their absence from Chintu Car Point. CRL.A. 1248/2015 + connected matters Page 92 of 94 104. Arguments predicated on exculpatory material creates doubt on presence of Sushil Arora and Rajesh Pandey in the Indica car. One is left with reservation and in uncertainty with the prosecution version based on the evidence led and adduced to implicate Sushil Arora and Rajesh Pandey. Points recorded above show two different motives which could be behind the crime. The facts proved overwhelmingly indicate that the brawl outside Chintu Car Point and not the money dispute was the compelling factor, though the latter aspect could be intertwined. Certainty for confirmation of the eye-witnesses identification of Sushil Arora and Rajesh Pandey is missing and absent. In these circumstances there is a lingering doubt in my mind on whether Sushil Arora and Rajesh Pandey were present in the Indica car. Reasons for the said doubt are manifold and get reflected from the points noted above in favour of Sushil Arora and Rajesh Pandey.

105. In view of the aforesaid discussion, I would dismiss the appeals preferred by Hemant Garg, Sonveer and Vishnu with one clarification that they stand convicted vide judgment dated 2nd July, 2015 under Sections 302 and 307 read with Section 34 IPC and not under Section 120B IPC. The order on sentence dated 26th August, 2015 which records that they have been convicted under Section 120-B of the IPC is incorrect and contrary to the judgment dated 2nd July, 2015. The order of sentence is modified to this extent.

106. Another error in the order of sentence is that no separate sentence was pronounced in respect of conviction under Section 307 read with Section 34 IPC.
R.K. Gauba J.

in his judgment dated 8th CRL.A. 1248/2015 + connected matters Page 93 of 94 February, 2017 has in view of the facts and circumstances held that punishment of life imprisonment with fine deserves to be enforced for both the offences i.e. under Section 302 as well as Section 307 IPC. The substantive imprisonment of life on each account would run concurrently. Under Section 307 IPC where hurt is caused, the offender is liable to either imprisonment for life or such imprisonment which may extend to 10 years and is also liable to fine. Second part of Section 307 is not applicable.

107. I concur with punishment awarded by R.K. Gauba, J.

under Section 307 read with Section 34 IPC keeping in view the nature of offence and the manner in which firing had taken place. The three appellants, however, are entitled to benefit of Section 428 IPC and sentences for the offence under Section 307 read with Section 34 IPC would run concurrently with the sentence under Section 302 read with Section 34 IPC.

108. In view of the aforesaid discussion, I would accept the appeals preferred by Sushil Arora and Rajesh Pandey and hold that they are entitled to be acquitted by giving them benefit of doubt. If the said appellants are in custody, they will be released forthwith, if not required in any other case. DECEMBER 5h , 2017 ssn CRL.A. 1248/2015 + connected matters Sd/- (SANJIV KHANNA) JUDGE Page 94 of 94

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